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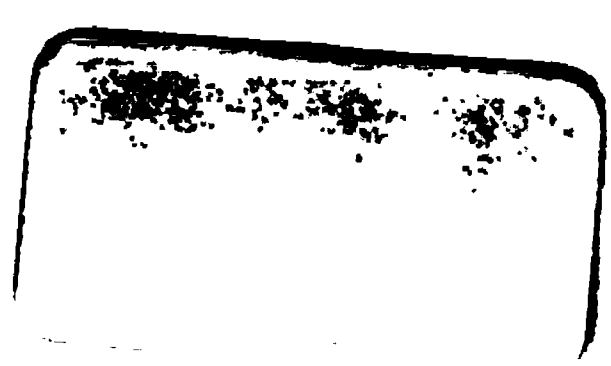

REPORTS

FROM

THE COURT OF CLAIMS,

SUBMITTED TO THE

HOUSE OF REPRESENTATIVES

DURING

THE FIRST SESSION OF THE THIRTY-SIXTH CONGRESS,

1859-'60.

FIVE VOLUMES.

WASHINGTON:
THOMAS H. FORD, PRINTER.
1860.

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36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 241.

JOSIAH F. POLK.

FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the Honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JOSIAH F. POLK *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Report from the Second Auditor filed as evidence by claimant, transmitted to the House of Representatives.
3. Claimant's brief.
4. Opinion of the Court adverse to the claim.
5. Opinion of Judge Scarburgh dissenting.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this fifth day of December, A. D. 1859.
[L. S.]

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

Petition:

JOSIAH F. POLK *vs.* THE UNITED STATES.

To the honorable the Judges of the Court of Claims of the United States:

The petition of Josiah F. Polk, of the city of Washington, District of Columbia, respectfully represents:

That while the petitioner was the chief clerk in the office of the Second Auditor of the Treasury, under appointment of the head or

chief officer of the Treasury Department, and in the performance of his duties as chief clerk in said Audito'rs office, to wit, on the 12th day of May, 1846, he was appointed by the President of the United States "acting Second Auditor of the Treasury," with directions to perform the duties of said Second Auditor during his absence; that he did perform the duties of said Second Auditor from the date of his appointment aforesaid, until the 15th of June following, inclusive, when the Second Auditor returned and resumed the duties of his office; that again, to wit, on the 3d day of April, 1849, and while chief clerk as aforesaid, he received from the President of the United States a similar appointment of "acting Second Auditor of the Treasury" during the absence of the Second Auditor, and performed, as required, the duties of said Auditor until the 8th day, inclusive, of the same month, April, when P. Clayton, esq., was appointed Second Auditor of the Treasury, and entered upon the duties of his office: that during the two periods aforesaid, your petitioner performed, besides the duties of the Second Auditor, his appropriate duties of chief clerk of the office; that the first period, from the 12th of May to the 15th of June, 1846, inclusive, consisted of thirty-five days; and the second, from the 3d to the 8th of April, 1849, consisted of six days; making an aggregate of fourty-one days, during which he performed the duties of the Second Auditor of the Treasury, and for which he claims compensation at the rate of pay allowed to an Auditor of the Treasury of the United States, which was three thousand dollars per annum.—(For President's authority, see Stat. at L. v. 1, p. 281.)

And further, the petitioner states that, although he never entertained a doubt of the justness of his claim, and having no recourse, before the organization of this honorable Court, but to the Congress, and learning that claims of the same character were there pending, he determined not to prefer his until those should terminate in favor of the claimants. Some of them having come before the Court of Claims and received favorable decisions, (he refers particularly to the claim of Michael Nourse,) the petitioner now prefers his claim, which is sustained by the same principles, to the same tribunal, and prays a similar decision; and as in duty bound, will pray, &c.

JOSIAH F. POLK,
For himself.

TREASURY DEPARTMENT,
Second Auditor's Office, February 1, 1858.

SIR: I have the honor to return herewith the letter referred to me on the 30th ultimo, from Samuel H. Huntington, chief clerk Court of Claims, containing a certified copy of an order of court asking for certain evidence from the Treasury Department to be used in the case of J. F. Polk *vs.* the United States, viz:

"How many days do the records of the Second Auditor's office show that the petitioner did service as Second Auditor of the Treasury, *ad interim*, or as Acting Second Auditor, in the months of May

and June, 1846, and in April, 1849, designating the beginning and ending of each period of service, together with any other information in your department tending to elucidate said claim?"

In reply I report that the records of this office show that J. F. Polk did service as Acting Second Auditor, from the 12th May to the 15th June, 1846, inclusive, and from the 3d to the 8th April, 1849, inclusive; for which periods J. M. McCalla received the pay as Auditor and J. F. Polk was paid only as chief clerk of this office, as will appear from the accounts of the disbursing agent for salaries (W. Mechlin) for the second quarter of 1846, and the second quarter of 1849, adjusted by the First Auditor of the Treasury, and now on the files of the Register of the Treasury.

Very respectfully, your obedient servant,

T. J. D. FULLER,
Second Auditor.

Hon. HOWELL COBB,
Secretary of the Treasury.

IN THE COURT OF CLAIMS.

No. 1,600.

JOSIAH F. POLK *vs.* THE UNITED STATES.

PETITIONER'S BRIEF.

The fact alledged is, that the claimant "did services as Acting Second Auditor of the Treasury, from the 12th of May to the 15th of June, 1846, inclusive, and from the 3d to the 8th of April, 1849, inclusive," making together 41 days; for which he has received no compensation. (See Record, p. 4.)

The position assumed is, that he is entitled to compensation for the period he rendered said service, at the rate allowed by law to auditors of the Treasury, and he rests his case upon the decisions of the court of claims in the cases of Michael Nourse *vs.* The United States, Asbury Dickins *vs.* The United States, and others, which stand on the same footing precisely.

J. F. POLK,
Counsel for Claimant.

IN THE COURT OF CLAIMS.

DECEMBER 5, 1859.

JOSIAH F. POLK *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the court.

The petitioner was chief clerk in the office of the Second Auditor of the Treasury, and on the 12th day of May, 1846, he was appointed

by the President "acting Second Auditor," with directions to perform the duties of the Second Auditor during his absence. Under this appointment and these directions the petitioner performed the duties of the Second Auditor from the 12th of May, 1846, to the 15th of June, inclusive. On the 3d day of April, 1849, under a similar appointment and direction, and in the absence of the Second Auditor, the petitioner performed the duties of the Second Auditor from said 3d day of April, 1849, until the 8th day, inclusive, of the same month. Thus the petitioner, under these appointments as acting Second Auditor, performed the duties of Second Auditor for forty-one days in all, during which time Mr. McCalla, the Second Auditor, received the appointed salary of his office, and the petitioner received only his regular salary as chief clerk, and he now claims compensation for his services as acting Second Auditor of the Treasury at the rate of three thousand dollars per annum, the pay allowed by law to the Auditor of the Treasury of the United States.

The 12th section of the statute of the 26th of August, 1842, (5 U. S. L.,) provides as follows:

"SEC. 12. No allowance or compensation shall be made to any clerk or other officer by reason of a discharge of duties which belong to any other clerk or officer in the same or any other department; and no allowance or compensation shall be made for any extra service whatever which any clerk or other officer may be required to perform."

The principle of this provision we understand to be that the salary of a clerk or other officer, as fixed by law, purchases his whole time for the United States, and that therefore he is not to receive any other compensation than the salary of his proper office because a part of his time is transferred to the duties of another officer. If this is the purpose of the provision, its terms are to be construed in reference to it, and so as to effect it.

The petition sets forth that the petitioner, being chief clerk, performed the duties of the Second Auditor, and there is no averment or proof that he performed any other duties than those of clerk and of Second Auditor. These facts only place him directly within the purview and terms of the statute, and they make the case the statute contemplates, in which no allowance or compensation shall be made.

It was contended for the petitioner that he was appointed "Assistant Second Auditor," and held that office in his own right, and that its duties were his own and not "*those which belong to any other officer*," so that he was not within the statute.

The answer is, that there is no such officer known to the law as "Assistant Second Auditor," and no duties or compensation prescribed or provided for such an officer.

The petitioner was appointed to perform the duties of "Second Auditor" under section 8th of the act of 1792, which is in these words: "In the case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War Department, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he

shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sicknes shall cease."

This act does not authorize the President to create *a new office*, and then to transfer to such office the duties assigned by law to the office of Second Auditor, and no such purpose can be inferred from the fact that the President, in executing the section, pointed to the duties which the appointee was to perform by styling him "Assistant Second Auditor." Giving a significant appellation does not create an office, or make an officer.

Then the only *duties* the President could appoint to under the act of 1792 were the *very duties* of the absent officer, viz: the Second Auditor, and the petitioner was appointed to no other duties, and has performed no other, and these he was, as chief clerk, bound to perform "without allowance or compensation" therefor. And he must show he has performed other duties than those of chief clerk and Second Auditor to entitle himself in law or equity to further compensation; for compensation belongs to the performance of duties and nct to mere title or appellation.

We are of opinion that the the petitioner is not entitled to the relief he claims.

IN THE COURT OF CLAIMS.

DECEMBER 5, A. D. 1859.

JOSIAH F. POLK *vs.* THE UNITED STATES.

SCARBURGH, J., dissented.

The principles of this case were adjudicated by this court in the cases of Asbury Dickins *vs.* The United States, Cornelius Boyle's Administrator *vs.* The United States, and Michael Nourse *vs.* The United States.

In the case of Asbury Dickins *vs.* The United States we held that, under the act of April 20, A. D. 1818, (3 Stat. at L., p. 447, ch. 87, § 9,) no clerk in any of the departments shall, *as clerk*, receive any other compensation than is authorized by that act, but that he is not thereby inhibited from receiving compensation for the discharge, whilst holding the office of clerk, of the duties of any other office which may be lawfully conferred on him. We also held that, when the President, under the act of 1792, (1 Stat. at L., p. 281, ch. —— § 8,) authorizes any person to perform the duties of Secretary of State or of Secretary of the Treasury, such person is thereby invested with an office, and becomes entitled, during his continuance therein, to the salary provided by law for Secretary of State or Secretary of the Treasury, as the case may be; and that, if such person be a clerk in one of the departments, he is entitled to such salary in addition to his salary as clerk.

In the case of Cornelius Boyle's Administrator *vs.* The United States, it was held that the act of 1792 is applicable to the Department of the Navy, and that a clerk appointed under that act to perform the duties of Secretary of the Navy is entitled, during the continuance in that office, to the salary of the Secretary of the Navy in addition to his salary as clerk.

The case of Michael Nourse *vs.* The United States involved the same principles as the other two cases, and also the construction of the acts of March 3, A. D. 1839, (5 Stat. at L., p. 349, ch. 82, § 3,) of August 23, A. D. 1842, (ibid., p. 510, ch. 183, § 2,) and of August 26, A. D. 1842. It was held that these acts were inapplicable to that case, for the reason that they do not contemplate a case where the same person holds two distinct offices at the same time.

I delivered the opinion of the court in the case of Cornelius Boyle's Administrator *vs.* The United States, and now refer thereto for the reasons on which my opinion in this case, as to the several points there discussed, is founded. As the construction of the acts of 1839 and 1842, just noticed, was not involved in that case, I propose now briefly to notice them.

The act of March 3, A. D. 1839, is as follows: No officer in any branch of the public service, or any other person whose salaries, or whose pay or emolumenis, is or are fixed by law and regulations, shall receive any *extra* allowance, or compensation, in any form whatever, for the disbursement of public money or the performance of any other service, unless the said *extra* allowance or compensation be authorized by law." It is, in my judgment, so plain that a man holding two offices and receiving the salary of each can in no sense be said to receive an *extra* allowance of compensation, that to state the proposition is sufficient to command universal assent. It cannot be made plainer by argument. It seems to me, therefore, that the act of 1839 has no application to this case.

The act of August 23, A. D. 1842, is as follows: "No officer in any branch of the public service, or any other person whose salary, pay, or emoluments is or are fixed by law or regulation, shall receive any additional pay, *extra* allowance or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, *extra* allowance, or compensation." This is plainly but a re-enactment of the act of 1839, with the addition of the words, "and the appropriation therefor explicitly set forth that it is for such additional pay, *extra* allowance, or compensation." But these words have no reference to the case of a person holding two offices. It seems to me, therefore, that this act can have no application to this case.

The act of August 26, A. D. 1842, is as follows: "No allowance or compensation shall be made to any clerk or other officer by reason of the discharge of duties which belong to any other clerk or officer in the same or any other department; and no allowance or compensation shall be made for any *extra* services whatever which any clerk or other officer may be required to perform." It does not seem to me that this act contemplates the case of a person who holds the office of

clerk and also the office of acting Secretary of the Treasury. When such a person performs the duties of the latter office, he performs his own appropriate duties just as truly as when he performs his duties as clerk. The fact that another officer, the actual Secretary of the Treasury, is clothed by law with the same powers and duties, can make no difference in this respect. Instances of this kind might be cited without number. In the State of Virginia each justice of the peace is invested with the same powers and the same duties in all respects with every other justice in his district; but still each has his own office, his own duties, and his own responsibilities. An acting Secretary of the Treasury performs the duties of the *office* of Secretary of the Treasury, but not the duties of the actual secretary. The latter is in no sense and in no respect responsible for the former. The acting secretary has a special appointment and a special commission. This is a distinct public employment, "coupled with the duty of fulfilling it according to law." His office, his duties, and his responsibilities are his own, and not another's.

My construction of the act of August 26, A. D. 1842, is, it seems to me, sustained by the subsequent legislation of Congress. The act of March 3, A. D. 1849, provides in terms for the case of a clerk holding the office of acting secretary or acting head of a bureau. It is as follows: "No clerk or other officer shall receive the salary of any secretary or head of bureau for acting or having acted in his place or office while said secretary or head of bureau receives such salary." (9 Stat. at L., p. 370, ch.—, § 4.) Now, this act was wholly superfluous if the cases for which it provides were embraced by the act of August 26, A. D. 1842. It will be observed, too, that it inhibits a clerk or other officer from receiving the salary of a secretary or head of bureau only when such secretary or head of bureau receives such salary, but that it contains no such inhibition when such secretary or head of bureau does not receive such salary. This, it seems to me, necessarily implies that it was the legislative understanding, (1) that, prior to the passage of the act of 1849, there was no such inhibition by law as that which is expressly declared by it; and (2) that a clerk or other officer appointed under the act of 1792 to perform the duties of the office of secretary or head of bureau, in case of the *death* of such secretary or head of bureau, is entitled to the salary of such secretary or head of bureau. But this implication is wholly inconsistent with the act of August 26, A. D. 1842, if it applies to such cases as the present.

I cannot concur in the opinion that the principle of the provision in the act of August 26, A. D. 1842, is, that the salary of a clerk or other officer, as fixed by law, purchases his whole time for the United States. An office is a public employment to which certain duties are annexed, and all that the government can require is the fulfilment of those duties. When this is done, the just claims of the public on the officer are satisfied. Hence, where there are two or more offices not incompatible with each other, they may be held by the same person, with the right to take the fees and emoluments of each, unless there be some statutory prohibition.

My opinion is, that the petitioner is entitled to relief.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 242.

WILLIAM GEIGER.

[To accompany bill H. R. C. C. No. 96.]

FEBRUARY 11, 1860.—The Court of Claims submitted the following report, which, together with the accompanying bill, was referred to the Committee of Claims.

MARCH 1, 1860.—Ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

WILLIAM GEIGER *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documentary evidence offered by the claimant, transmitted to the House of Representatives.
3. Evidence offered by the government, transmitted to the House of Representatives.
4. Claimant's brief.
5. United States deputy solicitor's brief.
6. Opinion of the court.
7. Bill allowing claimant $4,010 62.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this fifth day of December, [L. S.] A. D. 1859.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

No. 1.

COURT OF CLAIMS.

WILLIAM GEIGER *vs.* UNITED STATES.

To the honorable the Judges of the Court of Claims:

The petition of William Geiger, of the city of Fort Smith, in the county of Sebastian and State of Arkansas, respectfully represents: that on the 18th day of October, A. D. 1854, a contract was made and entered into by and between Captain S. G. French, assistant quartermaster United States army, on behalf of the United States, of the one part, and your petitioner of the second part, a copy of which contract is hereto annexed, by which said contract the said Captain S. G. French, on behalf of the United States, bound himself to pay unto the said Geiger a certain price for the performance of certain work as a stone mason; and by which said contract the said Geiger bound himself, under certain penalties, to do and perform said work in a good and workmanlike manner, and within a certain specified time, in the erection of a stone barrack at Fort Washita, in the Choctaw nation; and in the quarrying of rock and burning of lime, to be used in the construction of said military barrack; all of which will more fully and at large appear by reference to the copy of the articles of agreement aforesaid, hereunto annexed.

That your petitioner did at once proceed to Fort Washita, and with his employés, hired and brought with him from Arkansas, commenced said work in compliance with his said contract.

That your petitioner was compelled to hire hands at most enormous rates of wages, in order to fill his said contract.

That after the work had progressed some way, he and his workmen were compelled to cease working in consequence of a lack of material to be used in other departments of said building, and which of necessity should progress in proportion to his work; and during such time his men idle, your petitioner was compelled to pay said men full wages for doing nothing, while and he they were ready waiting and willing to be at work, in order to complete said contract within the said specified time, and were prevented for the cause above stated.

That Fort Washita being in the Indian country where no mechanics can be found, and distant from the place of residence of your petitioner nearly two hundred miles, he was compelled to employ workmen in the State and keep them under wages, and could not discharge them, as others could not be found; and that while at Fort Washita your petitioner was under enormous expenses in the subsistence of himself and his men, having to pay two prices for almost every thing he needed; and that your petitioner from repeated delays in the furnishing of material for other parts of the building than that which demanded his attention as per contract, was compelled to return to his home with fourteen men under wages, three several times, which involved your petitioner deeply in debt, and almost destroyed his credit and his business.

That during the progress of said building your petitioner, in order to complete his contract, was compelled to borrow money and at a most exorbitant rate of interest.

That in consequence of the detention by the non-arrival of material which was to have been furnished by the United States, in order that the several departments of said building might be in progress at the same time, as your petitioner's part could not possibly be performed, only in proportion as the carpenters proceeded with their part, and with which your petitioner had nothing whatever to do, your petitioner has been materially damaged.

That your petitioner finally completed the building on the —— day of November, A. D. 1856, and that he has not yet been fully paid therefor.

That after the completion of said building it was received and approved by the acting quartermaster at Fort Washita, and that before your petitioner could receive any part of his pay, he was compelled to leave his family, his home, and his business, and go to Fort Washita three times, in hope of being paid, and had to remain there, under very heavy expenses, over a month at a time.

That your petitioner is aware that the privations and inconveniences above set forth, in the "States" would be of minor importance, but situated as he was, in an Indian country, where provisions of every kind are sold at very high prices, and where, had he discharged his men when idle, he could not have replaced them at any price per day; they were difficulties almost insurmountable, and ones too which have almost entirely ruined petitioner's business and placed him and his affairs in such a position that the whole amount due for said work so done and performed according to contract, and received and approved by the proper officer whose duty it was so to do, when paid to your petitioner, will not be sufficient to clear him of the liabilities contracted by him in the consideration of the same.

And that your petitioner earnestly prays that this honorable court, in view and in consideration of the above and foregoing facts, will consider his case, cause an investigation to be had, and allow unto your said petitioner a sum of money sufficient to satisfy all the damages he has sustained by reason of the causes hereinbefore stated, which sum should not be less than ten thousand dollars, in addition to what he has already been paid.

Your petitioner will add that he is the sole owner of this claim, and refers to the act establishing this court, as conferring full jurisdiction in the class of cases to which it belongs.

WILLIAM GEIGER.

JOHN M. McCALLA,
Attorney for claimant.

[A true copy.]

Articles of agreement made this 18th day of October, 1854, between Captain S. G. French, assistant quartermaster United States army, on behalf of the United States of the one part, and William Geiger, of the city of Fort Smith, Arkansas, of the second part. This

agreement witnesseth: That the said Captain S. G. French, assistant quartermaster United States army, for and on behalf of the United States of America, and William Geiger, for himself, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other (by the approval of the quartermaster general) in the following manner, viz:

1st. That the said William Geiger shall proceed from this place to Fort Washita, Choctaw nation, and there, under the direction of Major George J. Andrews, acting assistant quartermaster, or such person as shall be performing the duties of quartermaster at the fort, proceed to quarry stone, burn lime, lay the foundation, and erect a stone barrack of such dimensions as may be directed, and in the following manner: The walls of the basement story to be two feet in thickness, the principal story to be one and a half feet in thickness, the whole to be rough cast on the outside, and finished by "floating" twice; the inside to be of the customary evenness for plastering; the whole to be done in a good substantial workmanlike style, including the chimneys as specified or may be directed; the windows and doors to be arched with *furnished brick*, with sills of dressed stone of hard and substantial kind.

2d. It is further agreed and understood that the said Geiger quarry all the stone and burn all the lime he may require, at his own expense, on or near the military reserve of the garrison, or, in other words, he shall furnish all the material and erect the walls and chimneys for the consideration hereinafter mentioned.

3d. It is agreed that the said Captain S. G. French, assistant quartermaster, shall pay, or cause to be paid, for the furnishing of materials, erecting and finishing the walls and chimneys, unto the said William Geiger, or his heirs, executors, &c., for each perch of sixteen and a half cubic feet, as measured in the walls and projecting chimneys, the sum of three dollars and twenty-four cents, windows and doors included in the measurement.

4th. The bricks for arching the windows and doors to be furnished by the United States; but for the windows and door-sills of hard dressed stone said Geiger is to be paid seventy-five cents per superficial foot so dressed.

5th. For furnishing the lime and plastering the walls and ceilings inside, said Geiger shall be paid thirty-five cents per yard, it being understood that the plastering shall be two coats, walls floated and finished, white, but not "hard finished" by trowelling.

Now the condition of this obligation is such, that if the said William Geiger, his heirs, &c., shall well and truly, and without fail, erect and finish the said walls and chimneys, (except the plastering inside,) on or before the 30th day of June, 1855, he shall be paid as specified, and this obligation to be void, but otherwise to remain in force to the effect of the said Geiger forever forfeiting to the United States one-third of all money due him on account of said building and materials, which said third amount due shall be retained in the hands of the

superintending quartermaster until the entire work is completed as specified.

S. G. FRENCH,
Captain and Assistant Quartermaster.
WILLIAM GEIGER.

Sealed and delivered in the presence of—
S. M. WILLARD.
CHARLES WRIGHT.

To remove any doubts in the construction of the above contract, it is here stated that the distinct understanding of the parties to the contract was that the said Geiger was to furnish, at his own expense, stone properly quarried on the ground near the garrison; that he was to furnish the lime at the kilns, burned at his own expense, and that the quartermaster's department was to haul the stone, the lime, the sand, &c., to the site of the building, in other words, said Geiger was not required to haul any of the materials required in the construction of the building from the places of preparation to the site of the building.

S. G. FRENCH,
Captain and Assistant Quartermaster.
WILLIAM GEIGER.

Additional agreements made November 1, 1854:

1st. The undersigned agree that the acting assistant quartermaster at Fort Washita shall pay William Geiger twenty-five cents per perch for loading the wagons when the public teams haul the stone from the quarry.

2d. The acting assistant quartermaster will give provision returns for William Geiger's laborers not exceeding ten rations per diem, and the value of said rations, as stated by the assistant commissary of subsistence, shall be deducted and credited the United States on every settlement.

WILLIAM GEIGER.
GEORGE P. ANDREWS,
Brevet Major and First Lieutenant 3d artillery, A. Q.

DISTRICT OF COLUMBIA, }
Washington County, } *ss:*

Personally appeared before me, a justice of the peace in and for said county, the above-named John M. McCalla, who made oath that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

Given under my hand this nineteenth day of October, 1857.

H. HAYDEN,
Justice of the Peace.

Particulars of Claim.

THE UNITED STATES TO WILLIAM GEIGER, DR.

To amount paid thirteen workmen for five months idle, at Fort Washita and Fort Smith, during the progress of work, and while delayed by the failure of the government to fill her contract with Geiger; five of said men at $65 per month, and eight of said men at $39 per month, is.....	$3,185 00
To amount paid the same number of workmen idle, from the same cause, at the same rates, during three several trips to and from Fort Washita and Fort Smith, while waiting for work, (say for three months;) and for cost of transportation, three times each way, of said men; each trip twenty to twenty-five days, at $260 each trip in and out, is.....	$2,691 00
To amount of interest paid by me on borrowed money, to carry on said work, when government should have paid me, say.....	450 00
To amount of expenses of myself in going to and returning from Fort Washita seven trips; and while waiting at Fort Washita for my money, after the completion of said work; at one trip, $100; one other trip, $30; and five trips, at $20 each, is.....	230 00
To loss of and to my business while waiting on the government to fill her contract, and to pay for work when finished, causing me great delay, and preventing me from doing other work offered me during said time, say.....	1,000 00
To amount of loss sustained to my credit, by being unable to meet my liabilities, and pay money when promised that I borrowed, and by being unable to pay my men according to contract as work progressed, all caused by the government failing to discharge her part of said contract. Can make no estimate.	
To amount for board of self and thirteen workmen, while idle, from causes above set forth, fourteen men for five months, at $25 per month per man.....	1,750 00
	$9,306 00

To this might be added several other items of loss and damage by me sustained, from above and foregoing causes, but wishing for nothing but to be compensated for actual loss, on account of and caused by the neglect of government; and, believing that said amount of $9,306 will cover it, I ask no more.

WM. GEIGER.

STATE OF ARKANSAS, *County of Sebastian, ss:*

I, William Geiger, of Fort Smith, Arkansas, do solemnly swear that the above and foregoing account, against the United States, for loss and damage by me sustained by reason of the government failing to fulfil her part of a certain contract between the United States and me, the said Geiger, relative to the erection of a military barrack at Fort Washita, and by reason of the United States failing to pay me for said work when completed is just and true; that the work on said barrack was done, performed, and completed by me; and that each of the foregoing items for loss and damage is as nearly correct and true as I can or could make it; and that I am actually the loser of, and damaged in, the sum of nine thousand, three hundred and six dollars, by reason of said failures and delays by the United States as aforesaid; and that a sum less than this will not fully compensate me for the loss and damage sustained by me thereby, to say nothing of how much and to what extent my credit has been injured in this matter; so help me God.

WM. GEIGER.

Sworn to and subscribed before me, an acting justice of the peace, duly commissioned and qualified, in and for said county and State, by William Geiger, who to me is personally well known, this 7th day of April, A. D. 1858.

J. H. SPARKS,
Justice of the Peace.

Interrogatories to claimant's witnesses.

SIR: I propose to take the depositions of Thomas Vernon, Benjamin F. Atkinson, Joseph Knobel, Jacob Ziegenbein, John C. Atkinson, Rev. Mr. Burk, and George P. Andrews and others, at Fort Smith city, and at Fort Washita, on the enclosed interrogatories, at such time as the claimant and the commissioner may agree on, to be read as evidence in the claim now pending before the said Court of Claims, in which I request your concurrence.

Respectfully, your obedient servant,
JOHN M. McCALLA,
Attorney for Claimant.

SOLICITOR *of Court of Claims.*

The above proposition is assented to, and cross-interrogatories added.

J. D. McPHERSON,
Deputy Solicitor.

OCTOBER 20, 1859.

IN THE COURT OF CLAIMS.

WILLIAM GEIGER *vs.* UNITED STATES.

Interrogatories on part of claimant.

1. Are you acquainted with William Geiger, of Fort Smith city, Arkansas, and, if so, do you know of his having erected a barrack at Fort Washita, in the Choctaw nation?

2. How many workmen did he have employed in said work, and what were their wages per day, and expenses of supporting them while employed, or while waiting for work?

3. Was or was not said Geiger compelled to suspend his part of the work from failure of the government to cause the remainder of the work to be done by the carpenter in time for said Geiger; and, if so, how long and how often was he so delayed?

4. Did he or not return to Fort Smith with his workmen during the progress of said work; and, if so, state how often, and from what cause?

5. What is the distance between Fort Smith and Fort Washita, and what is the usual expense of travel from one to the other?

6. What were the expenses for subsistence at Fort Washita, between October, 1854, and November, 1856, either by purchasing supplies and furnishing one's self, or by boarding?

7. Do you know of any damage sustained by said Geiger in consequence of said delays, either in his business or by borrowing money, or any other way? If so, state it particularly.

8. Do you know of the work being finally completed and received by the proper officer at Fort Washita, and did or not said Geiger fail to receive pay for the same until he had been obliged to travel several times to said fort; and, if so, how often and how long was he delayed at said fort, and at what expense?

9. Was it or not impossible to procure workmen at Fort Washita suitable for said Geiger's contract, and was he or not compelled, in consequence, to keep his men on pay and expenses even while idle, in consequence of the delay of government?

JOHN M. McCALLA,
Attorney for Claimant.

Cross-interrogatories.

1. Recur to your answer to the third interrogatory, and state expressly and particularly in what respects the government officers failed to do what was necessary on their part to enable Geiger to proceed with his work; what carpenter's work was to be done and was not done in time?

2. Recur to your answer to the seventh interrogatory, and state fully the data upon which you found your estimate of damage sustained by Mr. Geiger.

3. In what manner did you acquire the information you have given in your answers? From the workmen employed by Mr. Geiger; from

Mr. Geiger, or in other ways; distinguishing the information received from these sources?

J. D. McPHERSON,
Deputy Solicitor.

Deposition of B. F. Atkinson.

Depositions of witnesses taken and subscribed before me, C. C. Benton, clerk of the circuit court of the county of Sebastian, in the State of Arkansas, on the 23d day of January, A. D. 1858, and following days, between the hours of 9 o'clock a. m. and 4 o'clock p. m. of said days, at the law office of James H. Sparks, in the city of Fort Smith, county and State aforesaid, in pursuance of an order of the United States Court of Claims for me to act as commissioner, and to be read as evidence in a certain cause now pending in the said court at Washington city, D. C., wherein William Geiger is claimant and the United States defendant; on the part of the claimant, Benj. F. Atkinson, a witness to me known to be of lawful age, being to me, at the time and place aforesaid, produced, and being by me duly sworn to tell the truth, the whole truth, and nothing but the truth, relative to the cause aforesaid, did then and there, on his oath aforesaid, depose as follows, to wit:

I, Benj. F. Atkinson, tinner, aged twenty-one years, have resided in the city of Fort Smith, county of Sebastian, State of Arkansas, during the past year; have not any interest, direct or indirect, in the claim which is the subject of inquiry between William Geiger and the United States; and that I am not, in any degree whatever, related to the claimant.

And to the first interrogatory, marked "1," hereunto annexed, he answers: That he is acquainted with William Geiger, of Fort Smith city, State of Arkansas; that he knows of his having erected a barrack at Fort Washita, in the Chickasaw nation, for the United States.

To the second interrogatory, marked "2," hereunto annexed, he answers: That the said Geiger had in his employment, in the erection of said barrack, at Fort Washita, thirteen men; and that their wages per day was two dollars each; and that the expense of supporting each man, while employed, or while unemployed waiting for work, was from twenty-five to thirty dollars per month.

To the third interrogatory, marked "3," hereunto annexed, he answers: That the said Geiger was compelled to suspend his part of the work from failure of the government to cause the remainder of the said work to be done by the carpenters in time for the said Geiger, the first of which time he was delayed a few days over one month, and the other of which time he was delayed between nine and ten weeks.

To the fourth interrogatory, marked "4," hereunto annexed, he answers: That the said Geiger did return to Fort Smith with all his workmen, during the progress of said work, three several times; and that the cause of said Geiger's returning to Fort Smith during the progress of said work were, at one time, the failure of the government

to have the carpenter's work on said barrack progress sufficiently far, and in sufficient time, for him, the said Geiger, to proceed with his part of the work, and at the other times a failure of the government to haul rock required by the said Geiger in the construction of said barrack; and that one other cause for said Geiger's returning to Fort Smith while thus delayed was, that he, the said Geiger, was compelled to procure means with which to pay his workmen, as he could not procure the same at Fort Washita.

To the fifth interrogatory, marked "5," hereto annexed, he answers: That the distance between Fort Smith and Fort Washita is one hundred and eighty miles; and that the usual expense of travel from one place to the other is from one dollar and a half to two dollars per day, for man and horse.

To the sixth interrogatory, marked "6," hereto annexed, he answers: That the expense of subsistence at Fort Washita, between October, A. D. 1854, and November, 1856, either by purchasing supplies and furnishing one's self or by boarding, were from twenty-five to thirty dollars per month per man.

To the seventh interrogatory, marked "7," hereto annexed, he answers: That said Geiger did sustain great damage in consequence of said delays, not only to his reputation; in this he was damaged in a pecuniary point of view while thus delayed, whereas he could be profitably employed elsewhere during the time of said delays, but was compelled to await the movements of government in this matter. And by being employed elsewhere, he, the said Geiger, could have his men working while receiving pay, (as he knows that the said Geiger could have been employed were it not for his engagement with the government,) instead of being compelled to pay them for doing nothing, and that he, the said Geiger, was damaged in his reputation, in this—that the said Geiger, in order to wait the demands of his workmen and pay them their accruing wages, was compelled to borrow four thousand dollars, for which he had to pay twelve per cent. per annum. That the said Geiger borrowed said money on the faith and strength of his contract with the government; and that he was unable to pay the same according to his promises, by reason of the government having failed to provide for the performance of his part of the work, and in the failure of the government to pay said Geiger when said work was completed and received.

To the eighth interrogatory, marked "8," hereto annexed, he answers: That he knows said work was finally completed; and of its having been received by Capt. Lendrum, at Fort Washita; and that said Geiger did not receive pay in full for the same until after he was obliged to travel two different times to Fort Washita in order to obtain the same. That the said Geiger was delayed at one time at said Fort 42 days, while waiting to receive his pay for said work so completed; and at the other time he was delayed at said fort while waiting for his pay 14 days, each time at an expense of from one dollar and a-half to two dollars per day; and that said Geiger, at one time after the completion of said work, and before being paid for the same, sent a messenger to Fort Washita to receive his said pay, at an expense of one dollar per day besides subsistence.

And in answer to the ninth interrogatory, marked "9," hereto annexed, he answers: That it was impossible to procure workmen at Fort Washita suitable for said Geiger's contract; and that he was compelled in consequence to hire his workmen in the States, and keep them on pay and expenses as well when idle, in consequence of the delays of government, as when at work.

And at the same time and place, the said Benjamin F. Atkinson, on his oath aforesaid, in answer to the first cross-interrogatory, marked "1," hereto annexed, answers: That the government officers did fail on their part to furnish material for the carpenters to proceed with their work, and that, by the said carpenter's work being unprepared, Geiger was of necessity compelled to suspend operations on his part and wait the movement of government to furnish material. That the government officers also failed to haul rock and deliver it at the site of the said building as per contract, in order that Geiger and his men might proceed with their work; and that the government officers did fail to fulfil the contract on their part by not paying to said Geiger some money as the work progressed. The carpenter's work to be done, and which was not done, was the laying of sleepers for the upper and lower floors of said building.

To the second cross-interrogatory, marked "2," hereto annexed, he answers: That the data upon which he founded the estimate of damage sustained by said Geiger, are founded upon actual observation, having had a thorough knowledge of the said contract, and of the manner in which the work progressed, and being acquainted with said Geiger and his business.

And to the third cross-interrogatory, marked "3," hereto annexed, he answers: That the manner in which he acquired the information he has given in his answers, was from being an eye witness of nearly every transaction in connexion with said building; being a workman on said building as tinner, not in the employment nor in connexion with said Geiger, and from a thorough knowledge of the many privations and disadvantages to which said Geiger was exposed in endeavoring to procure workmen in the States, in his almost total disability to pacify and reconcile his men while at Fort Washita a part of the time unemployed, he, the said Geiger, having no means wherewith to pay his said men the wages then due and accruing to them, said Geiger being one hundred and eighty miles from a point at which he might have procured funds to have done so. That he also acquired some information of the damages sustained by Geiger from some of the workmen employed by him, having heard some of them manifest the greatest dissatisfaction towards, and complain loudly of, said Geiger, for the manner in which he treated them by not paying them their wages when due, and by keeping them unemployed at Fort Washita, fearing lest they would not be paid for their time. And that he received some from Mr. Geiger himself, whom he has frequently heard say long before he was aware that Mr. Geiger had this claim pending, that he would not undertake such a job again for ten thousand dollars more than the amount to be paid for it, and that most of his information was obtained from being an

eye witness of the affair; and that he knows of nothing more. Further this deponent saith not.

BENJ. F. ATKINSON.

Deposition of D. P. Hancock.

And at the same time and place, before me also appeared Lieutenant D. P. Hancock, a witness known to me to be of lawful age, and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in reference to the claim aforesaid, deposed as follows:

I, D. P. Hancock, lieutenant, and acting assistant quartermaster United States army, aged twenty-four years, have resided at Fort Washita in the Chocktaw nation during the past year; have no interest, direct or indirect, in the claim which is the subject of inquiry; and am not related in any manner whatever to the claimant; and in answer to the first interrogatory, marked "1," hereto annexed, answers, that he is acquainted with William Geiger, of the city of Fort Smith; and that he knows of said Geiger having erected a stone barrack for the United States at Fort Washita, in the Choctaw nation, some time between the years 1854 and 1857; and to the second interrogatory, marked "2," hereto annexed, answers, that he has no definite knowledge; and in answer to the third interrogatory, marked "3," hereto annexed, answers, that he cannot say; and in answer to the fifth interrogatory, marked "5," hereto annexed, answers, that the distance between Fort Smith, Arkansas, and Fort Washita, in the Choctaw nation, is about 170 miles, and that the expenses of travel between said points is about one dollar per day; and in answer to the eighth interrogatory, marked "8," hereto annexed, he answers, that he knows of the final completion of the work, and never heard any objections urged by the proper officer, whose duty it was to have received it, against the work; and is satisfied it was received and approved; and that he knows that said Geiger did not receive pay for said work when completed, as per contract, as the work was completed when the quarters were turned over to him, said Lieutenant D. P. Hancock, acting assistant quartermaster, United States army, in December, A. D. 1856, and said Geiger did not receive his pay for said work for nearly six months afterwards; and that said Geiger was compelled to come to said Fort Washita, from his home, several times, in order to obtain his money; does not know how often, but knows that he came several times; and in answer to the ninth interrogatory, marked "9," hereto annexed, he answers, that he is satisfied that then, as now, it was impossible to procure workmen at Fort Washita, suitable for said Geiger's contract; and is satisfied that he must have been compelled to procure men elsewhere in order to fill his contract; and in answer to the third cross-interrogatory, marked "3," hereto annexed, he answers, that the information given in his answers was acquired from actual observation, and that he knows that said Geiger performed said work as the contract for said work between the United States and said Geiger was turned over to him in his official capacity,

and that he afterwards paid said Geiger for said work; and that he knows of nothing more. Further this deponant saith not.

D. P. HANCOCK,
Second Lieutenant Seventh Infantry.

Deposition of Thomas Vernon.

And at the same time and place, before me also appeared Thomas Vernon, a witness known to me to be of lawful age, and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in regard to the claim aforesaid, deposed as follows:

I, Thomas Vernon, architect, aged forty-five years, have resided in Fort Smith, Sebastian county, State of Arkansas, during the past year, and ever since the year 1851; have no interest, direct or indirect, in the claim which is the subject of inquiry; and am not in any matter whatever related to the claimant; and in answer to the first interrogatory, marked "1," hereto annexed, he answers, that he is well acquainted with William Geiger, of the city of Fort Smith, Arkansas; has known him for nearly six years; that said Geiger did erect a barrack for the United States, at Fort Washita, in the Choctaw nation; that he was in charge of said building, as architect, and that he drafted the plan for said building; in answer to the second interrogatory, marked "2," hereto annexed, he answers, that said Geiger had thirteen men employed on said barrack, at the expense of two dollars per day, wages; and that the expenses for boarding each man per month was from twenty to twenty-five dollars, while employed or unemployed waiting for work; in answer to the third interrogatory, marked "3," hereto annexed, he answers, that said Geiger was compelled to suspend operations, on his part, from failure of the government to cause the work to be prepared for him, said Geiger, from failure of the government to haul rock and lime, as per contract, for said Geiger to proceed with his work, and from the delay caused by the government not causing the carpenters' work to progress sufficiently fast for the stone work to be continued; said Geiger was thus compelled to suspend operations some four times; one time about two days, one other time about two months, one other time about six weeks, and one other time about three or four months; in answer to the fourth interrogatory, marked "4," hereto annexed, he answers, that said Geiger did return to Fort Smith with his workmen during the progress of said work; that Geiger and his men returned to Fort Smith two several times; and that the cause of his leaving Fort Washita and returning home during the progress of said work was a failure on the part of the government to furnish material and deliver it at the site of building, as per contract, in time to have other parts of the work progress sufficiently far and sufficiently fast to enable said Geiger to proceed with his part; and a failure on the part of the government to furnish and deliver in time material required in said Geiger's part of said work; and in answer to the fifth interrogatory, marked "5," hereto annexed, he answers, that the distance between Fort Smith and Fort Washita is one hundred and eighty miles, and

that the expense of travel from one to the other is at least two dollars per day for man and horse.

In answer to the sixth interrogatory, marked "6," hereto annexed, he answers: That the expense of subsistence at Fort Washita, between October, 1854, and November, 1856, was by boarding, say fifteen dollars per month per man, and by purchasing supplies and furnishing one's self, from fifteen to twenty-five dollars per month per man.

In answer to the seventh interrogatory, marked "7," hereto annexed, he answers: That he knows of said Geiger being damaged in his business and in his reputation by said delays in his business; by being compelled to borrow money, at enormous rates of interests, to pay his men for doing nothing as well as when at work; by discounting quartermaster drafts ten per cent. for cash, wherewith to be enabled to carry out his contract; and in his reputation by not being able to pay the money borrowed at the time promised, in consequence of the government failing to pay him, said Geiger, as the work progressed; and by the government failing to pay said Geiger when said work was completed, received, and approved.

In answer to the eighth interrogatory, marked "8," hereto annexed, he answers: That he knows that said work was finally completed by said Geiger, and received by the proper officer; and that said Geiger failed to receive pay for said work until he was compelled to travel to Fort Washita several times for it; one time he waited there about six weeks, at an expense of at least two dollars per day, to say nothing of time and absence from business.

And in answer to the ninth interrogatory, marked "9," hereto annexed, he answers: That it was impossible to procure workmen at Fort Washita suitable for said Geiger's contract, and that said Geiger was in consequence compelled to keep his men in pay and expenses even while idle, in consequence of the delays of government, as well as when at work; for had he discharged said workmen, while compelled, by the failure of government to perform their part of the contract, to suspend operations, he could not, at any point within one hundred and fifty or two hundred miles, at any price, be able to procure men suitable for his contract.

And in answer to the first cross-interrogatory, marked "1," hereto annexed, he answers: That the government officers failed to do what was necessary on their part to enable said Geiger to proceed with his work, in this: that they failed to furnish, haul, and deliver at the site of building, material, rock, lime, and brick, so that said Geiger could proceed with his work; that the carpenters' work, which was to be done, and was not done in time, so that Geiger's work might go on without delay, was the failure to have in place in time a tier of joists on the second floor.

In answer to the second cross-interrogatory, hereto annexed, marked "2," he answers: That the data upon which he founds the estimate of damages sustained by said Geiger is derived from a thorough knowledge of the facts set forth in his answer to the seventh interrogatory. And in answer to the third cross-interrogatory, marked "3," hereto annexed, he answers: That the manner in which he acquired the information given in the several answers here-

before was from a personal and positive knowledge of the facts of the whole transaction, and of the many privations to which Geiger was exposed during the progress of said work, being superintendent of the building, and could not fail to have the knowledge of the facts above set forth; and that he knows of nothing more.

And further this deponent saith not.

THOMAS VERNON.

Deposition of John Emerich.

And at the same time and place, before me also appeared John Emerich, a witness known to me to be of lawful age, and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in reference to the claim aforesaid, deposed as follows: I, John Emereich, merchant and dealer in family groceries, aged twenty-seven years, have resided in Fort Smith, Arkansas, during the past year, and ever since 1849; have no interest, direct or indirect, in the claim which is the subject of inquiry, and am not in any manner whatever related to the claimant. I am acquainted with William Geiger; know that he was employed during the years, or a part of the years, A. D. 1854, 1855, and 1856, in the erection of a stone barrack at Fort Washita, in the Choctaw nation, for the United States, during which time I loaned money to said Geiger with which to pay his men, and help to support them and him while employed on said work; and that said Geiger paid me interest on said money at the rate of ten per cent. per annum; that the said Geiger did not pay me said money loaned him, nor the interest thereon, for over eighteen months from the time said money was loaned him, and over twelve from the time that he, said Geiger, agreed to pay the same; and that the said Geiger urged on me as the cause of thus disappointing me, and not making good his promise to pay, that the government had failed to pay him for his work done and being done on said barrack. I am well acquainted with several of the workmen that were employed by said Geiger on said work, and I know that they were all very much dissatisfied with said Geiger for the manner in which said Geiger treated them by being compelled to keep them at times out of their pay for work done, and by keeping them at Fort Washita idle, they fearing that he would not pay them because they were not to wcrk; and I know that they oftentimes spoke in very hard terms of said Geiger in consequence thereof; and I know that said Geiger afterwards paid his men all that was due them; and that he paid them full wages for time spent at Fort Washita idle, when they could not proceed with their work; this I am satisfied of; I have it from the workmen themselves, as well as from Geiger afterward; and a part of the payment, for time spent doing nothing, to said men, came under my own knowledge and observation; and no more.

Further this deponent saith not.

JOHN EMERICH.

Deposition of Jacob Ziegenbein.

And at the same time and place, before me also appeared Jacob Zeiginbein, a witness known to me to be of lawful age, and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in regard to the claim aforesaid, deposed as follows:

I, Jacob Zeiginbein, stone-mason, aged thirty-five years, have resided in Fort Smith, Arkansas, during the past year, and ever since the year 1854; have no interest, direct or indirect, in the claim which is the subject of inquiry, and am not related in any manner whatever to the claimant; and in answer to the first interrogatory, marked "1," hereto annexed, he answers that he is acquainted with William Geiger, of Fort Smith City, Arkansas, and that he knows that he did erect a stone barrack for the United States at Fort Washita, in the Choctaw nation, some time in 1854, 1855, and 1856.

In answer to the second interrogatory, marked "2," hereto annexed, he answers, that William Geiger had employed on said work thirteen or fourteen hands on an average—he sometimes had as many as twenty men employed on it—at wages of two dollars per day; and that the expense of supporting said men while at work, or while idle, was not less than twenty or twenty-five dollars per month per man.

In answer to the third interrogatory, marked "3," hereto annexed, he answers, that said William Geiger was compelled to suspend his part of the work from failure of the government to cause the remainder of the work to be done by the carpenter in time for said Geiger to proceed with his part. He was thus delayed as many as four or five times; at one time about three months, and all the other times together about two months more.

In answer to the fourth interrogatory, marked "4," hereto annexed, he answers, that said Geiger did return to Fort Smith with his workmen during the progress of said work; that he returned with his workmen two several times, which was caused by a failure of the government to have the carpenter's work done, so that Geiger's part could be proceeded with, and from a failure on the part of the government to have material, rock, and lime hauled to the site of building, in order that Geiger could proceed with the stone-work.

In answer to the fifth interrogatory, marked "5," hereto annexed, he answers, that the distance between Fort Smith and Fort Washita is about one hundred and eighty miles, and the expense of travel from one to the other is from two dollars to two dollars and fifty cents per day per man and horse.

In answer to the sixth interrogatory, marked "6," hereto annexed, he answers, that the expenses of subsistence at Fort Washita, between October, 1854, and November, 1856, either by purchasing supplies and furnishing one's self, or by boarding, were from twenty-five to thirty dollars per month per man.

In answer to the seventh interrogatory, marked "7," hereto annexed, he answers, that he knows that said Geiger was damaged in

his business, by reason of these delays, by not being able to pay his hands regularly; and by being kept nearly three years in the completion of said work, while he could have done his part in eight months, the time contracted; and by setting his men against him, in consequence of the manner in which he was compelled to do, in consequence of the frequent and long delays; in not having the carpenter's work ready for him to proceed; in not having material—brick to build pillars, rock, and lime—ready for him to go on with his part; and by being compelled to double scaffold, in order to try to work, without the proper arrangements being made, so that he could work; that he was damaged in his reputation, by being compelled to borrow money at large rates of interest to pay his men, and by not being able, by reason of said several delays, to meet his engagements and pay said money so borrowed on the strength of said contract with the United States, according to his promise so to do; and that he was also damaged in this, that while he and his workmen, under pay, were idle, he could have been to work elsewhere, and makin gmoney, instead of paying men, some thirteen or fourteen in number, for doing nothing; and that he knows of no time for years before or since that provisions rated so high as a part of the time during the progress of said work, though they always command nearly two prices at places so far removed from the States as Fort Washita.

In answer to the eighth interrogatory, marked "8," hereto annexed, he answers, that he knows that said work was finally completed (and received by the proper officer at Fort Washita) by said Geiger, and the said Geiger did fail to receive his pay for the same for a long time after said work was completed, and that he had been obliged to travel to Fort Washita several times money-hunting, seeking there his pay for said work; that he went there three several times on said business, and that he was delayed at one time about six weeks, at the expense of about two dollars and fifty cents per day, sometimes more, as he knows that he could not at one time get to stay at Fort Washita, and was compelled to go out and return frequently twenty-five miles from said fort in consequence thereof, and at increased expense.

And in answer to the ninth interrogatory, marked "9," hereto annexed, he answers, that it was impossible for said Geiger to procure men at Fort Washita suitable for his contract, and that said Geiger was in consequence compelled to keep in pay and expenses, even while idle in consequence of said delays; and that he himself was one of the men who, during said delays, was so kept in pay and expenses while waiting the movement of government to furnish material, &c.

And in answer to the first cross-interrogatory, marked "1," hereto annexed, he answers, that the government officers failed to haul and deliver rock, lime, and brick, in order to enable said Geiger to proceed with his work; that the carpenter's work that was to be done, and was not done in time, was the laying of joist in the second floor.

In answer to the second cross-interrogatory, marked "2," hereto

annexed, he answers that the data upon which he founds his estimate of damages sustained by said Geiger is founded on the fact that he was employed during all of the time by said Geiger in the erection of said barrack; that he was an eye-witness to the whole of his privations; that he was paid by said Geiger, while employed on said work, while idle; and that he knows that no ordinary amount of damages for said delays would be sufficient to compensate said Geiger.

And in answer to the third cross-interrogatory, marked "3," hereto annexed, he answers, that he acquired the information given in the foregoing answers from actual observation, being in the employ of said Geiger on said building; that he knows of all of it from personal and actual observation. And further this deponent saith not, but that he knows no more.

JACOB ZIEGENBEIN.

Deposition of John Beckel.

And, at the same time and place, before me also appeared John Beckel, mayor of the city of Fort Smith, Arkansas, a witness known to me to be of lawful age, and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in regard to the claim aforesaid, deposed as follows: I, John Beckel, mayor of the city of Fort Smith, Arkansas, aged fifty-two years, have resided in Fort Smith during the last year and during the last sixteen years; have no interest, direct or indirect, in the claim which is the subject of inquiry, and am not in any way whatever related to the claimant; and in answer to the first interrogatory, marked "1," hereto annexed, he answers, that he is acquainted with William Geiger, of Fort Smith city, Arkansas, and that he knows of his having erected a stone barrack for the United States at Fort Washita, in the Choctaw Nation, between 1854 and 1857. In answer to the third interrogatory, marked "3," hereto annexed, he answers, that said Geiger returned to Fort Smith during the progress of said work, and that said Geiger told him that the reason why he returned was that the carpenter's work on the building was not sufficiently far for him to proceed, and that he was, in consequence, compelled to suspend operations; that he does not know how long or how often said Geiger was thus delayed. In answer to the fourth interrogatory, marked "4," hereto annexed, he answers, that said Geiger did return to Fort Smith, with all his workmen, during the progress of said work, as many at least as two several times; and that the cause of their so returning was that the government was not ready with other parts of the work so that the stone-work could go on. And in answer to the fifth interrogatory, marked "5," hereto annexed, he answers, that the distance between Fort Smith and Fort Washita is one hundred and eighty miles, and that the usual expense of travel from one to the other is at least twenty dollars per man. In answer to the sixth interrogatory, marked "6," hereto annexed, he answers, that he does not exactly know, but that he knows that it must have been very high, as at and during a part of that time provisions rated vastly higher than for years before

or since; that the provisions, such as bacon, flour, &c., commanded prices nearly two hundred per cent. higher than for years before, or than they do now. In answer to the seventh interrogatory, marked "7," hereto annexed, he answers, that he knows that Geiger must have sustained considerable damage by reason of said delays in his business, by not being able to pay his men according to promise, and being compelled to keep his men on hand under pay idle waiting for work, in consequence of the government failing to be always ready for him; by borrowing money at high rates of interest; that he loaned him some, and had to wait over a year after due for it; and that said Geiger's reputation suffered by his not being able to meet his engagements with those from whom he borrowed money, from whom he bought supplies, and with his men; and all caused by the government keeping him so much longer at the work than the contract called for, the contract being for eight months, while it took nearly three years. And in answer to the eighth interrogatory, marked "8," hereto annexed, he answers, that said work was finally completed and received by the proper officer at Fort Washita; that said Geiger failed to receive pay for the same until he was obliged to travel several times to said Fort Washita for it; that he is not certain how often, nor does he know how long at a time, but knows that he was delayed at one time a month or six weeks, at an expense of about three hundred dollars, to say nothing of horse-hire and time away from his business. And in answer to the ninth interrogatory, marked "9," hereto annexed, he answers that it was impossible for said Geiger to have procured workmen at Fort Washita suitable for his contract, and that he was compelled, in consequence, to keep his men in pay and expense even while idle, in consequence of the delays of government.

And in answer to the first cross-interrogatory, marked "1," hereto annexed, he answers, that the government officers failed to have material on hand as per contract, so that Geiger could proceed with his work; that the carpenter's work that was to be done, and was not done in time was, that one floor of joists was not laid by the carpenters in time for the stone masons to proceed with their work.

And in answer to the second cross-interrogatory, marked "2," hereto annexed, he answers, that the data upon which is founded the amount of damages sustained by Geiger, as stated in answer to the seventh interrogatory, is from knowledge and observation of facts, and that he is satisfied that no ordinary amount—not even as much again as he received for the work—would compensate him fully for his privations, loss, damage, and inconvenience; for the amount of time (say nearly three years) spent in completion of said work, which could have been done in contract time, (say eight months,) during which he had travelled so often back and forth to Washita, and was kept from undertaking other work, was almost misspent, or at least spent for nought, besides the amount of money paid workmen for doing nothing.

And in answer to the third cross-interrogatory, marked "3," hereto annexed, he answers that a part of his information he had from Geiger's men, who stated at times that they were all compelled to suspend operations in consequence of the delays of government, and the

remainder he has from actual knowledge and observation ; and that he knows of nothing more.

Further this deponent saith not.

JOHN BECKEL.

C. C. BENTON, *Clerk*,
By J. A. ENO, *Deputy Clerk*.

STATE OF ARKANSAS, *County of Sebastian, ss:*

On this 23d day January, A. D. 1858, personally came Benj. F. Atkinson, Lieut. D. P. Hancock, Thomas Vernon, John Emerich, Jacob Ziegenbein, and John Beckel, the witnesses within named, and after having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, and the interrogatories were proposed to said witnesses respectively, and answers thereto were written down in my presence, and in the presence of the witness who then subscribed the deposition in my presence. The depositions of said witnesses, taken at the request of John M. McCalla, attorney for the claimant, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of William Geiger, a claimant, and the United States is defendant. The adverse party was notified, did not attend, and did not object.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office at office, this 23d day of January 1858. [L. S.]

C. C. BENTON, *Clerk*,
By J. A. ENO, *Deputy Clerk*.

Witness' Fees.

B. F. Atkinson, attendance 50c ;	37 miles' travel,	$1 02	$1 52
Lieut. D. P. Hancock, att. 50c ;	" " "	$1 02	1 52
John Emerich, attendance, 50c ;	" " "	$1 02	1 52
Jacob Ziegenbein, attendance 50c ;	" " "	$1 02	1 52
John Beckel, attendance 50c ;	" " "	$1 02	1 52
Clerk's fees.....			10 40
Postage on this.....			18

Copy of Contract.

Articles of agreement made this 18th day of October, 1854, between Captain S. G. French, assistant quartermaster United States army, on behalf of the United States, of the one part, and William Geiger, of the city of Fort Smith, Arkansas, of the second part. This agreement witnesseth : That the said Captain S. G. French, assistant quartermaster United States army, for and on behalf of the United States of America, and William Geiger, for himself, his heirs, executors and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other, (by the approval of the quartermaster general,) in the following manner, viz :

1st. That the said William Geiger shall proceed from this place to Fort Washita, Choctaw nation, and there, under the direction of Major

George P. Andrews, acting assistant quartermaster, or such person as shall be performing the duties of quartermaster at the post, proceed to quarry stone, burn lime, lay the foundation, and erect a stone barrack of such dimensions as may be directed, and in the following manner: The walls of the basement story to be two feet in thickness, the principal story to be one and a half feet in thickness; the whole to be rough-cast on the outside, and finished by "floating" twice; the inside to be of the customary evenness for plastering; the whole to be done in a good, substantial, workmanlike style, including the chimneys, as specified or may be directed; the windows and doors to be arched with *furnished brick*, with sills of dressed stone, of hard and substantial kind.

2d. It is further agreed and understood that the said Geiger quarry all the stone and burn all the lime he may require at his own expense, on or near the military reserve of the garrison; or in other words, he shall furnish all the material and erect the walls and chimneys for the consideration hereinafter mentioned.

3d. It is agreed that the said Captain S. G. French, assistant quartermaster, shall pay, or cause to be paid, for the furnishing of materials, erecting and finishing the walls and chimneys, unto the said William Geiger, or his heirs, executors, &c., for each perch of sixteen and a half cubic feet, as measured in the walls and projecting chimneys, the sum of three dollars and twenty-five cents, windows and doors included in the measurement.

4th. The bricks for arching the windows and doors to be furnished by the United States; but for the window and door sills, of hard dressed stone, said Geiger is to be paid seventy-five cents per superficial foot, so dressed.

5th. For furnishing the lime and plastering the walls and ceilings inside, said Geiger shall be paid thirty-five cents per yard, it being understood that the plastering shall be two coats, walls floated and finished white, but not "hard finished" by trowelling.

Now, the condition of this obligation is such, that if the said William Geiger, his heirs, &c., shall well and truly, and without fail, erect and finish the said walls and chimneys (except the plastering inside) on or before the 30th day of June, 1855, he shall be paid as specified, and this obligation to be void; but otherwise to remain in force, to the effect of the said Geiger forever forfeiting to the United States one-third of all money due him on account of said building and materials; which said third of amount due shall be retained in the hands of the superintending quartermaster, until the entire work is completed as specified.

S. G. FRENCH,
Captain and Assistant Quartermaster.
WILLIAM GEIGER.

Sealed and delivered in the presence of—
S. M. WILLARD,
CHARLES WRIGHT.

Approved.

TH. S. JESUP,
Quartermaster General.

SECOND COMPTROLLER'S OFFICE,
October 23, 1858.

I certify the above is a true copy of the contract of William Geiger on file in this office.

J. MADISON CUTTS,
Comptroller.

Copies of bills paid petitioner.

TREASURY DEPARTMENT,
Third Auditor's Office, October 23, 1858.

SIR: In compliance with your request of this date, I herewith enclose copies of the vouchers for payment to Wm. Geiger, by Lt. D. P. Hancock, in the 2d quarter, 1857.

Respectfully, your obedient servant,

R. J. ATKINSON,
Auditor.

J. M. MCCALLA, Esq.,
Washington, D. C.

The United States to William Geiger, from 14*th January*, 1856, *to* 30*th September*, 1856, *Dr.*

For 856 perch 13 feet masonry, at $3 25 per perch.....	$2,784 56
For 2,161 perch 12 feet loading, at 25 cents per perch.....	540 44
For 1,931¼ feet of cut stone, at 75 cents per foot.....	1,448 43
For labor, 20 days, at $2 50 per day.....	50 00
For service for team and teamster, 43 days, at $3 00	129 00
For 963 yards of plastering, at 35 cents per yard.....	337 05
For excavation per agreement.....	155 00
For 7 feet of chimney, at $4 00 per foot.....	28 00
For delivering 57 perch of stone, at $1 00 per perch.....	57 00
For repairing chimneys, fireplaces, steps, &c.	106 00
	$5,635 48

I certify that the above account is correct and just, and that the work was executed and services rendered, in compliance with agreement made with Capt. S. G. French, A. Q. M., on the 18th of October, 1854, and subsequent agreement with B'vt Maj. G. P. Andrews, 3d Ar'y, A. A. Q. M., and myself.

J. H. LENDRUM,
B't Capt. U. S. A.

Received, Fort Washita, C. N., April 27, 1857, of 2d Lt. D. P. Hancock, 7th inf'y, A. A. Q. M., the sum of five thousand six hundred and thirty-five dollars and forty-eight cents, in full on the above account.

WM. GEIGER.

The United States to William Geiger, Dr.

1856.			
Nov. 25.	To cutting 355 feet stone steps, at 75 cents per foot...	266	25
"	To laying 18 perches stone, at $3 25 per perch.....	58	56
"	To loading 18 perches stone, at 25 cents per perch...	4	50
		$329	25

I certify that the above account is correct and just, and that the ser-services were rendered as stated, and that the account has never been paid.

D. P. HANCOCK,
Second Lieut., Seventh Inf , A. A. Q. M.

Received, Fort Washita, C. N., April 27, 1857, of Secoud Lieut. D. P. Hancock, seventh infantry, A. A. Q. M., the sum of three hundred and twenty-nine dollars and twenty-five cents in full on the above account.

WM. GEIGER.

LIEUTENANT HANCOCK'S STATEMENT.

William Geiger's account.

Amount due William Gieger December 31, 1856..... $6,621 00

Accepted in orders on his account.

1856.			
June 10—Accepted order in favor of Fry.....	$210	00	
June 10—Accepted order in favor of Geisler.....	210	00	
June 13—Accepted order in favor of Heiss	167	00	
Mar. 22—Accepted order in favor of Hanna	357	00	
June 16—Accepted order in favor of Dr. J. Burke.	1,100	00	
June 16—Accepted order in favor of Robertson...	34	32	
Dec. 1—Accepted order in favor of J. A. Crawford.....	10	00	
Dec. 2—Accepted order in favor of Jesse Reed...	75	63	
Dec. 14—Accepted order in favor of Charles Lange.....	22	00	
Dec. 14—Accepted order in favor of Long Duplan.	28	00	
Dec. 20—Accepted order in favor of Robertson & Reed.....	96	18	
			2,310 13
Deducted for rations drawn from commissary.....			75 00
Amount loaned to him by Lieutenant Hancock.....			80 00
Total amount accepted in orders.....			2,465 13
April 27, 1857—Paid the balance due him.....			4,155 95

I hereby certify that the above amount of two thousand three hundred and ten dollars and thirteen cents was drawn by William Geiger in orders on the Quartermaster's department. I further certify that it is a matter of public notoriety that the above orders were given at a discount of ten per cent. I further certify that William Geiger has pay due him from January 14, 1857, to April 27, 1857, inclusive, and at the latter date the amount due him was six thousand six hundred and twenty-one dollars. I also certify that, as far as I can discover, the long delay in receiving pay for his services was not caused by any failure of his in fulfilling the terms of the contract made between him and Captain S. G. French, assistant quartermaster, dated October 18, 1854, but from the long delay of the department at Washington in forwarding the funds necessary for the payment of debts which its agents contracted at this post. I also certify that said Geiger finished all the work for which he received pay more than four months before he was paid.

D. P. HANCOCK,
2d Lieut. 7th Infantry, A. A. Q.

FORT LEAVENWORTH, *February* 1, 1858.

DEAR SIR: I have received your letter of December 15, 1857, respecting the claims of Mr. William Geiger upon the government for damages or expenses growing out of the non-fulfilment by the quartermaster's department of the terms agreed upon and the non-payment of money as it became due to him on his contract.

I do not remember sufficiently well the terms of the contract to be able to give a definite statement on the subject; for this he will have to depend upon Captain Lendrum or Captain French, the quartermasters. I remember perfectly well that Mr. Geiger had a number of men employed; that the difficulties of procuring supplies of different kinds interfered with the work on which Mr. Geiger's labors depended, and the great difficulty, and, indeed, impossibility, of procuring funds to meet payments, as they became due, by the quartermaster.

It was so with all, or nearly all, even of the mechanics and laborers employed by the department, and they were compelled to discount their claims against government in order to raise the money required for their ordinary expenses, (except, perhaps, the purchase of food; rations in some cases, if not all, being supplied at contract price by government.) I have no doubt that Mr. Geiger suffered considerable losses in this manner. How much I cannot pretend to say, but in all probability more than enough to swallow up all the profits of his contract. I am not surprised to hear that the results to him of the failure to supply his hands with work, so as to keep them employed, and the delays in paying him his dues have proved disastrous. The evils and hardships to all employed on the public works were obvious at the time, and caused much annoyance to the officers connected with them, and I would be glad to see compensation made to Mr. Geiger for the losses he sustained through no fault of his own. I cannot now

make a more particular statement than the foregoing. If what I have already said, or its substance, can be made useful to you, and you want it in a special form, by making it out and reading it to me you will obtain my signature.

Respectfully, your obedient servant,

HENRY I. HUNT,
Bvt. Major U. S. A., (late) com'g Fort Washita.

IN THE COURT OF CLAIMS.

No. 1665.

WILLIAM GEIGER *vs.* THE UNITED STATES.

Interrogatories to be proposed to Thomas Vernon, a witness for the United States.

1. If the petitioner was delayed in his work on the barrack at Fort Washita for the space of two days by the failure of the United States to perform some act which they were bound to perform, then state in what month this delay occurred, and what particular thing was it which the United States were bound to do and did not perform.

2. If the petitioner was obliged to suspend work a second time for the space of two months by the failure of the United States to perform some act which they were bound to but did not perform, then state when and in what months this suspension occurred, and what particular thing it was which the United States did not perform in due time.

3. State how long after the suspension of the work by Geiger it was before the United States officers began to perform their part, how long they were in doing the work, and how long after they had finished before Geiger resumed work.

4. Where were Geiger and his hands during the suspension? If they were absent from Fort Washita, state how long they were absent, and did they return before the work was ready for them to resume?

5. If the petitioner was obliged to suspend work a third time for the space of six weeks by the failure of the United States to perform some act which they ought to have performed, then state particularly what this act was, and in what months the suspension occured.

6. State when the United States officers began to perform their part of the work; how long they were about it; and how long after they had finished was it before Geiger's men resumed work.

7. Where were Mr. Geiger and his men during this suspension? If they left Fort Washita, state how long they were absent, and whether they returned before the work was ready for them to resume.

8. If the petitioner was obliged to suspend work a fourth time for the space of three or four months by the failure of the United States to perform some act which they ought to have performed, then state what was this act, and in what month the suspension occurred?

9. State when the United States officers began on this occasion t perform their part of the work; how long they were about it; an how long after it was finished was it before Geiger's men resume work?

10. Where were Mr. Geiger and his men during this suspension If they left Fort Washita, state how long they were absent, an whether they returned before the work was ready for them to resume

Cross-interrogatories.

1. Did you not keep Geiger advised of the times the work wa ready for him, during the various absences referred to in the fore going interrogatories, and did he not always attend promptly on suc notices being given?

2. Was it not less expensive to Geiger and his hands to return t Fort Smith during the suspensions of work than to remain at For Washita? Would the government be benefited by their remainin at Washita?

3. Reply to such interrogatories as may be put to you by Geiger o his attorney present.

JOHN M. McCALLA,
Attorney for Geiger.

The commission of these interrogatories appears from the schedul hereto annexed.

C. C. BENTON, *Clerk.*
By J. A. ENO, *Deputy Clerk.*

IN THE COURT OF CLAIMS.

No. 1,665.

WILLIAM GEIGER *vs.* THE UNITED STATES.

Interrogatories to be proposed to witnesses on the part of the Unite States.

1. Were you employed by the petitioner to work upon the ne barrack at Fort Washita; if so, when were you so employed?

2. During your employment, was the work at any time suspende for the want of materials, such as building stone, or lime, or by th failure of the carpenters to lay a floor of joists? If so, state how ofte the work was suspended; how long on each occasion; and in wh months these suspensions happened.

3. How did you dispose of your time during each of these suspe sions of work; did you remain at Fort Washita, or go away; we you entirely idle, or did you do any work of any kind; if you worke did you earn any money?

4. Did Mr. Geiger pay you wages during the suspension of th

work; did he pay your board; for how long a time and at what rate did he pay your wages and board during each of these suspensions?

5. Were you always ready and upon the spot to go to work as soon as the materials had been hauled? I mean the stone and lime.

6. Besides the suspensions caused by the failures of the United States, what other suspensions of the work happened on account of the season and other causes? And state how long in all you were engaged in actually working on the building?

JNO. D. McPHERSON,
Deputy Solicitor.

Cross-interrogatories.

1. Had not Geiger been always liable to be called on to resume work at Fort Washita during the suspensions, could he not have had constant employment at profitable wages for himself and hands?

2. Did he not require you to keep always ready to go to Washita when you should be wanted; and did you not obey all his calls?

3. Please answer such interrogatories as may be put to you by Geiger, or his attorney, present.

JNO. M. McCALLA,
Attorney for Geiger.

The commission of these interrogatories appear from the schedule hereto annexed.

C. C. BENTON, *Clerk.*
By J. A. ENO, *Deputy Clerk.*

Depositions of witnesses taken and subscribed before me, C. C. Benton, clerk of the circuit court within and for the county of Sebastian, in the State of Arkansas; duly commissioned as such on the 10th day of September, 1858, at the city of Fort Smith, in said county and State, in pursuance of a commission hereto annexed, and to be read as evidence in a certain cause now pending in the Court of Claims at the city of Washington, District of Columbia, wherein William Geiger is plaintiff and the United States is defendant. On the part of the defendant:

Deposition of Thomas Vernon.

Thomas Vernon, a witness, known to be of lawful age, being to me at the time and place aforesaid produced, and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in regard to the matters in controversy in the suit aforesaid, did then and there, on his oath aforesaid, depose as follows, to wit:

Interrogatory 1. If the petitioner was delayed in his work on the barrack at Fort Washita for the space of two days by the failure of the United States to perform some act which they were bound to perform, then state in what month this delay occurred, and what particular thing was it that the United States was bound to do and did not perform.

Answer. I reside in the city of Fort Smith, and have within the last twelve months. My occupation is that of a carpenter; and am forty-six years of age. I went to Fort Washita in March, 1855, about the 10th. I was employed by Captain French, the acting quartermaster at Fort Smith, to do so and to take charge of all the work at Fort Washita. When I arrived at Fort Washita I saw Mr. Geiger, who had several hands in his employ and all idle; and it was some three days before they were able to go at work, on account of the rock and lime not being hauled, the same being about two miles from said garrison. My understanding of the contract between the United States and Mr. Geiger was, that the government was to haul the rock and lime from the quarry and kiln to the place of building.

Interrogatory 2. If the petitioner was obliged to suspend work a second time for the space of two months by the failure of the United States to perform some act which they were bound to but did not perform, then state when and in what months this suspension occurred and what particular thing it was which the United States did not perform in due time.

Answer. The petitioner was obliged to suspend work a second time for the space of two months or more on account of there not being joists and other timbers necessary on hand, as also brick for pillars and chimneys. This suspension was some time, as well as I can recollect in July, 1855, and until about the middle or last of September of the same year. As I understand the contract made by the United States with Geiger, they were to furnish or provide the materials for the carpenter work so that said Geiger would not be delayed in his work.

Interrogatory 3. State how long after the suspension of the work by Geiger it was before the United States officers began to perform their part; how long they were in doing the work; and how long after they had finished before Geiger resumed work.

Answer. The officers had contracted with certain persons for the materials (timber and brick) some time before the suspension by Geiger which they failed to deliver as per said contract. There was no delay on the part of the carpenters, except for want of material.

Interrogatory 4. Where were Geiger and his hands during the suspension? If they were absent from Fort Washita, state how long they were absent; and did they return before the work was ready for them to resume?

Answer. Geiger and his hands were not at Fort Washita during this time. I think they were gone some two months or more, and that they returned just about the time the the work was ready for them to resume.

Interrogatory 5. If the petitioner was obliged to suspend work a third time for the space of six weeks by the failure of the United States to perform some act that they ought to have performed, then state particularly what this act was, and in what months this suspension occurred.

Answer. I do not know whether it was the fault of the United States or Mr. Geiger at the third suspension, but that it was cold weather and the teamsters in employ of government would not haul rock for the building. I think it was some five or six weeks that Mr

Geiger and his hands were detained by not having the rock hauled. This suspension was from about the last of December, 1855, to about the 20th of February, 1856.

Interrogatory 6. State when the United States officers began to perform their part of the work, how long they were about it, and how long after they had finished was it before Geiger's men resumed work.

Answer. I think the officers were doing all they could the whole time I was there to forward on the work, and were about all the time, and as soon as the material was on the ground Geiger's men commenced work.

7th interrogatory. Where were Mr. Geiger and his men during this suspension? If they left Fort Washita, state how long they were absent, and whether they returned before the work was ready for them to resume.

Answer. Mr. Geiger came to Fort Smith with me, as also one of his men, for the purpose of getting money to pay off his hands; the rest of his hands, about eight in number, remained at Fort Washita.

8th interrogatory. If the petitioner was obliged to suspend work a fourth time for the space of three or four months by the failure of the United States to perform some act which they ought to have performed, then state what this act was, and in what month the suspension occurred.

Answer. Yes; the work was suspended on or before the first of July, 1856, for the want of lathing nails which the government was to furnish.

9th interrogatory. State when the United States officers began on this occasion to perform their part of the work; how long they were about it, and how long after it was finished. Was it before Geiger's men resumed work?

Answer. I don't know when the United States officers began to perform their work on this occasion; I know that as soon as they were ready for Geiger to go to work he did so.

10th interrogatory. Where were Mr. Geiger and his men during the suspension? If they left Fort Washita, state how long, they were absent, and whether they returned before the work was ready for them to resume.

Answer. Mr. Geiger and his men were at Fort Washita during this suspension.

Cross-examined.

1st interrogatory. Did you not keep Mr. Geiger advised of the times the work was ready for him during the various absences referred to in the foregoing interrogations? and did he not always attend promptly on each notice being given?

Answer. I gave him notice of the different times, and he was always ready.

2d interrogatory. Was it not less expensive to Giger and his hands to return to Fort Smith during the suspension of work than to remain at Fort Washita? Would the government be benefited by their remaining at Washita?

Answer. I think that the expenses would have been about the same, the cost of living there being about twenty-five dollars per month, and the expense of living at Fort Smith is about twelve dollars per month, and the expense of coming from Fort Washita and returning is about fifty dollars; I do not think that the government would have been benefited by Geiger and his hands being present at any time during these several suspensions. Further deponent saith not.

THOMAS VERNON.

Not being able to complete the depositions in this cause this day, the taking of the same stands adjourned until to-morrow morning at 8 o'clock.

C. C. BENTON, *Clerk.*
By J. A. ENO, *Deputy Clerk.*

Saturday morning, 8 o'clock, September 11, 1858. Met pursuant to adjournment. No witnesses appearing this day, the same stands adjourned until Monday morning next, at 8 o'clock.

C. C. BENTON, *Clerk.*
By J. A. ENO, *Deputy Clerk.*

Monday morning, 8 o'clock, September 13, 1858. Met pursuant to adjournment. No witnesses appearing this day, the same stands adjourned until Tuesday morning next, at 8 o'clock.

C. C. BENTON, *Clerk.*
By J. A. ENO, *Deputy Clerk.*

Tuesday morning, 8 o'clock, September 14, 1858. Met pursuant to adjournment.

Deposition of Joseph Knoble.

Joseph Knoble, a witness known to me to be of lawful age, being to me at the time and place aforesaid produced, and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in regard to the matters in controversy in the suit aforesaid, did then and there, on his oath aforesaid, depose as follows, to wit:

I live in the city of Fort Smith, Sebastian county, and have for the past year. I am a stone-mason by trade, and am thirty-three years of age. I have no interest in this suit, either directly or indirectly, and am in no way related to the claimant in this cause.

1st interrogatory. Were you employed by the petitioner to work upon the new barrack at Fort Washita; if so, when were you so employed?

Answer. I was employed by the petitioner to work on the barrack at Fort Washita on the 14th day of November, 1854. Commenced work and quit work in December, 1856; on or about the 15th day.

2d interrogatory. During your employment was the work at any time suspended for the want of materials, such as building stone or

lime, or by the failure of the carpenters to lay a floor of joists. If so, state how often the work was suspended, how long on each occasion, and in what month these suspensions happened.

Answer. There were twice that the work was suspended for the want of having the rock and lime hauled to the place of building; first time in March, 1855, about three days; second time in October, 1855, four days, for the want of rock. The work was suspended for want of carpenter's work twice; the first time from June 30, 1855, to September 12, 1855. Second time from October 28, 1855, to November 21, 1855. There was plenty of rock quarried, and plenty of lime burnt, and the cause of the suspension of the work was because the same was not hauled to the building.

3d interrogatory. How did you dispose of your time during each of the suspensions of work? Did you remain at Fort Washita or go away? Were you entirely idle, or did you do any work of any kind? If you worked, did you earn any money?

Answer. I was idle, and at Fort Washita during the time we were out of rock and during the suspension of time for want of the carpenter's work. On the first occasion I returned to Fort Smith, but was not engaged in any work, holding myself in readiness to go to Fort Washita at any time that Mr. Geiger might call on me, and the second time I remained at Fort Washita. I did not earn any money during either of these intervals.

4th interrogatory. Did Mr. Geiger pay you wages during the suspension of the work? Did he pay your board? For how long a time and at what rate did he pay you wages and board during each of these suspensions?

Answer. Mr. Geiger paid me the same wages for the time of suspension of the work as while at work; also paid my board during the same time. I do not know what it cost Mr. Geiger to board me, but that he employed a cook and kept a mess. Provisions were worth as follows: coffee, 25 cents per pound; flour, $8 per 100 pounds; bacon, about 20 cents per pound; sugar, 33⅓ cents per pound; and while at Fort Smith he, the said Geiger, paid my board, which was about $12 per month. My wages were $3 per day. I was foreman of the work.

5th interrogatory. Were you always ready, and upon the spot, to go to work so soon as the materials had been hauled—I mean the stone and lime?

Answer. I was always ready.

5th interrogatory. Besides the suspensions caused by the failures of the United States, what other suspension happened on account of the season and other causes; and state how long, in all, you were actually engaged in working on the building?

Answer. I think I lost about 11 days on account of lumber to make the mortise-bed, scaffolding, &c., and 14 days on account of the inclemency of the weather. I was engaged from the commencement of the building to its completion, so far as Mr. Geiger was concerned, with the exception of the time of suspension of the work, as above

stated. In addition to the time lost in consequence of the suspension of work, as above stated, there was, from the last of June, 1856, to the last of September of same year, a suspension of time on account of not having nails for lathing; and that said Geiger paid me wages and board during said time; during the rest of the time I was at work, with the exception of four days days, when I was sick, which Mr. Geiger did not pay me wages for. I worked from the 14th of November, 1854, to about the 15th of March, 1855; and from the 1t9h of March, 1855, to about the 30th of June, 1855; and from the 12th of September, 1855, to about the 5th of October, 1855; and from the 9th of October, 1855, to the 28th of October, 1855; and from the 21st of November, 1855, to June 30, 1856; and from the 30th of September, 1856, to about the 15th of December, 1856.

Cross-examined.

1st cross-interrogatory. Had not Geiger been always liable to be called on to resume work at Fort Washita during the suspension, could he not have had constant employment, at profitable wages, for himself and hands?

Answer. He could.

2d cross-interrogatory. Did he not require you to keep always ready to go to Washita when you should be wanted, and did not you obey all his calls?

Answer. I was always ready, and went whenever he called on me, and could not engage in any other work on account of my engagement with him.

3d cross-interrogatory, (by Mr. Geiger.) How many times did Mr. Geiger have to come from Fort Washita to Fort Smith on account of the suspension of the work at that place?

Answer. About six times; it would take some ten days to perform the trip, at an expense of about $25 for each trip.

JOSEPH KNOBLE.

[Not having time to complete these depositions, the same are adjourned until to-morrow morning at 8 o'clock.]

Wednesday morning, 8 o'clock, met pursuant to adjournment.

Deposition of Jacob Ziegenbein.

Jacob Ziegenbein, a witness known to me to be of lawful age, being to me at the time and place aforesaid produced, and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in regard to the matters in controversy in the suit aforesaid, did then and there, on his oath aforesaid, depose as follows, to wit:

I live in the city of Fort Smith, and have the past 12 months; my occupation is that of a stone-mason, and am 35 years old.

Answer to 1st interrogatory. I was employed by Mr. Geiger to work upon the new barracks at Fort Washita about the 1st of November, 1854. I worked for said Geiger about seven or eight days,

when I was taken sick, and returned to Fort Smith, where I remained until about the 10th of September, 1855.

Answer to 2d interrogatory. During the time I was with said Geiger there were twice we had to stop work on account of the carpenter's work not having been done. The first time was on account of the joists not being put in, and we were detained, to the best of my recollection, from work some three or four weeks, which was from some time of the last of September, 1855, to October of the same year. The second time was, to the best of my recollection, on account of the joists, or some of them, not being in, and was, I think, about two weeks. There was also another time that Geiger was obliged to suspend work on account of there being no lathing nails on hand; this, I think, was in the spring of 1856; cannot say how long a time. I do not know of my own knowledge of any other times that Geiger had to suspend work. I was sick a portion of the time, and at Fort Smith, while in Geiger's employ.

Answer to 3d interrogatory. During the first suspensi n of work, I remained at Fort Washita with the other hands, and was entirely idle all of the time. The second time the same, and the third time I came to Fort Smith, at which time I quit work for said Geiger. Mr. Geiger could not and did not pay me my wages, as by our contract, for some nine months after I quit work.

Answer to 4th interrogatory. Mr. Geiger did not pay me wages during these suspensions, but boarded me. I do not know how much it cost Geiger to board me during these suspensions, but that provisions were very high during the time I was at Fort Washita; he paid my board for some five or six weeks' time.

Answer to 5th interrogatory. I was not there at any time when rock and lime was needed to be hauled; but, as before stated, was absent on account of sickness for some seven or eight days after commencing to September, 1855.

Answer to 6th interrogatory. In the winter of 1855 and 1856, Geiger and all of the hands stopped work about three or four weeks, on account of the inclemency of the weather. I cannot tell exactly how long I was actually engaged in working on the barracks at Fort Washita, but think from one hundred and twenty-five to one hundred and thirty days.

Cross-examined.

Answer to 1st cross-interrogatory. I do not know that Geiger was liable at any time to be called upon to resume work during the suspensions before mentioned, but was always ready to commence work whenever the carpenter's work was ready for him. Geiger could have had plenty of work in Fort Smith during the time he was compelled to be at Fort Washita, and at profitable wages.

2d interrorgatory.

Answer. Mr. Geiger always required me to be in readiness to go to work at any time I should be called on, and I always obeyed his commands.

3d interrogatory. Did not Geiger sustain a heavy loss on account

of credit, and the suspensions of work at Fort Washita, by having to borrow considerable sums of money, as well as being delayed with his hands?

Answer. I think he did.

4th interrogatory. Did Mr. Geiger send out his hands at any time to help the teamsters load the rock at the quarry, for the purpose of progressing with the mason work? If so, how long were they so employed?

Answer. Whenever the wagons went out to haul rock, Mr. Geiger sent out hands to help load. This was done by Geiger all the time I was there, and was done, as I understood, for the purpose of progressing with the work.

5th interrogatory. Was Geiger bound by the contract to help load the rock?

Answer. Having never seen the contract, I do not know. Further deponent saith not.

JACOB ZIEGENBEIN.

C. C. BENTON, *Clerk.*
By J. A. ENO, *Deputy Clerk.*

Deposition of George Hinch.

George Hinch, a witness, known to me to be of lawful age, being to me at the time and place aforesaid produced, and being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in regard to the matter in controversy in the suit aforesaid, did then and there, on his oath aforesaid, depose as follows, to wit:

I reside in the city of Fort Smith, in Arkansas, and have for the last twelve months past. My occupation is that of a wagoner, and am seventy-seven years of age.

1st interrogatory.

Answer. I was employed by Mr. Geiger to work on the new barrack at Fort Washita, and left Fort Smith on the first of November, 1854.

2d interrogatory.

Answer. During the time I was in the employment of Mr. Geiger, the work was suspended three different times. First, on account of there being no rock hauled, which was, to the best of my recollection, in the spring of 1855. I do not recollect how long Mr. Geiger remained idle at this time. The second suspension was on account of the carpenter work. I mean that there was no lumber there, such as plank and joist, which were necessary in order for Mr. Geiger to proceed with his work. I do not recollect when this suspension of work happened, but think it was in the summer of 1855; neither do I recollect how long a time it was before the carpenters were ready for Geiger. The third suspension of the work was on account of the brick for building the chimneys and pillars to said barrack not being there. This suspension was from the middle or last of July, 1855, to about the first of October, 1855.

3d interrogatory.

Answer. During the suspension of the first and second times, was all the time engaged in helping the teamsters load the rock at the quarry, and in quarrying rock while they were gone. On

the third time, I quit work for Mr. Geiger, and went to work for government. I was at Fort Washita all the time. I worked all the time of these suspensions, and looked to Mr. Geiger for my pay.

4th interrogatory.

Answer. Mr. Geiger paid me for all the time I was with him, which was from the time I commenced for him until the third suspension of his work, and he also boarded me as well as all his hands. Geiger paid me twenty dollars per month. I do not know what it cost Mr. Geiger to board one per month, but provisions of all kinds were very high during the whole time.

5th interrogatory.

Answer. I was always on the spot and at work.

6th interrogatory.

Answer. I think there was some three or four days the last of February, 1855, we had to stop work on account of cold weather. I was at work for Mr. Geiger, on the building and in the quarry, some little over eight months.

Cross-examined.

1st interrogatory.

Answer. Mr. Geiger, to the best of my understanding, was liable to go to work when the other work was ready. I think Mr. Geiger could have been profitably engaged as well as his hands.

2d interrogatory.

Answer. I was at Fort Washita the whole time, and at work for Geiger, and did whatever I was directed.

3d interrogatory. Was there any complaint among Mr. Geiger's hands because he did not pay them according to his and their contract, and did they not often refuse to work on said account?

Answer. There was considerable complaint among Mr. Geiger's hands because he did not pay them, and oftentimes were careless about going to work.

4th interrogatory. How many hands did Mr. Geiger have employed to work on the building?

Answer. From twelve to fifteen.

5th interrogatory. Did Mr. Geiger pay his hands wages and board them during these suspensions?

Answer. I know he (Geiger) paid all his hands that were at work by the month, and boarded all.

6th interrogatory. How long was Mr. Geiger in finishing his contract on said building?

Answer. To the best of my knowledge he was some time over three years.

7th interrogatory. Could he have completed his contract in less time if he had not been detained by the failure on the part of government to do their work? and, if so, how long would it have taken him?

Answer. He could have completed his work in less time if he had not been detained; I think in less than one-third of the time, from the hands he had employed.

Further deponent saith not.

GEORGE HINCH.

STATE OF ARKANSAS, *County of Sebastian, ss:*

On this 10th, 11th, 13th, 14th, and 15th days of September, A. D. 1858, personally came Thomas Vernon, Joseph Knoble, Jacob Zeingenbein and George Hinch, the witnesses within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by me and then proposed by me to the witness, and the answers thereto were written down by me in the presence of the witness, who then subscribed the deposition in my presence. The depositions of Thomas Vernon, Joseph Knoble, Jacob Ziengenbein and George Hinch, were taken at the request of the solicitor of the Court of Claims on the part of the United States, to be used in the investigation of a claim against the United States, now pending in said Court of Claims, in the name of William Geiger against the United States.

The adverse party was notified, did attend, and did not object only by cross-interrogatories.

C. C. BENTON, *Clerk.*
By J. A. ENO, *Deputy Clerk.*

Clerk's fees	$50 00
Witness' fees	4 00
	54 00

STATE OF ARKANSAS, *County of Sebastian, ss:*

I, C. C. Benton, clerk of the circuit court within and for the county and State aforesaid, do hereby certify that the above is a true, complete, and perfect statement of the transactions and proceedings in the above entitled cause as the same appears hereunto annexed.

[L. S.] In testimony whereof, I have hereunto set my hand and seal this 16th day of September, A. D. 1858.

C. C. BENTON, *Clerk.*
By J. A. ENO, *Deputy Clerk.*

Deputy Solicitor to the Quartermaster General.

OFFICE SOLICITOR COURT CLAIMS,
May 14, 1858.

GENERAL: I respectfully enclose herewith a copy of the petition of Wm. Geiger, asking indemnification for losses incurred in consequence of delays caused by the failure of the United States to furnish materials and perform their part of the work on the new barracks at Fort Washita, for which he had contracted to build walls, &c. This was in 1554, '55, '56.

I also enclose memoranda of points upon which information is especially desired, and respectfully suggest that if the information be not

on the files of your office, the officers in charge of the work be called on for report.

Very respectfully,

JNO. D. McPHERSON.

Major General JESUP, *United States Army.*

Mr. Geiger was contractor for building walls and chimneys and plastering new barracks at Fort Washita. The United States were to do all the carpenter's work, and to haul stone and lime and other materials.

It is alleged by Geiger that the United States did not do their part promptly; that he was delayed by the failure to lay the joists and to haul stone, &c.; that he was delayed four several times, viz: for two days, for two months, for six weeks, and for three or four months.

The suspension for these times is proved by Thomas Vernon, architect.

Geiger alleges that he kept his entire force of hands (13) under pay during the whole of this suspension, and claims for the loss thus incurred, besides other losses not necessary to mention.

It is desired to know how far the statement is true.

How long after the walls were ready for the joists was it before the joists were laid? After the stone was quarried by Geiger, how long was it before enough was hauled to keep his men at work? How many times did the supply fail? Was he always ready when the supply came?

Was no arrangement made with Geiger about this delay? Was he left in daily expectation from day to day for one, two, three or four months at a time of being able to go on with his work? Was no warning given him, or had he not reason himself to know that he had better discharge his hands until work was ready? Was he really under the *necessity* of keeping his men idle for such long periods as those above stated? Did he never complain, and if he did complain what conversation passed on such occasions?

On the whole, the transaction as stated by the petitioner, is not in accordance with the ordinary course of business, nor is any sufficient cause assigned for any such extraordinary deviation.

The men went home to Fort Smith three times during the suspensions. It is not to be credited that Geiger would suffer *every one of them,* (13,) *without exception*, to lie idle at their own houses and pay their board there for three months at a time.

The officers in charge of the work can no doubt throw light on this transaction.

J. D. McPHERSON, *Deputy Solicitor.*

Quartermaster General to the Deputy Solicitor.

QUARTERMASTER GENERAL'S OFFICE
Washington City, May 22, 1858.

SIR: You are respectfully informed, in answer to your letter of the 14th instant, which covered a copy of William Geiger's petition, ask-

ing indemnification for losses incurred by him while engaged in building a barrack at Fort Washita, that the information you seek cannot be obtained in this office. The officers who performed duty in the quartermaster's department at Fort Washita, during the time embraced in Mr Geiger's petition, have been called upon for reports in the case, which, as soon as they are received, will be referred to you in compliance with your request.

Very respectfully, your obedient servant,

TH. S JESUP,
Quartermaster General.

JOHN D. MCPHERSON, Esq.,
Assistant Solicitor Court of Claims.

Deputy Solicitor to the Quartermaster General.

OFFICE OF SOLICITOR COURT CLAIMS,
October 21, 1858.

GENERAL: Under date of May 21, 1858, I was informed that officers of your department had been called upon for reports in relation to the claim of William Geiger for indemnity for loss by delays in building barracks at Fort Washita, copies of which reports would be sent me.

If any have been received I would be obliged for copies authenticated to be laid before the court.

Very respectfully,

JNO. D. McPHERSON,
Deputy Solicitor.

Maj. Gen'l JESUP,
Quartermaster General, U. S. Army.

Quartermaster General to the Deputy Solicitor.

QUARTERMASTER GENERAL'S OFFICE,
WASHINGTON, *October* 30, 1858.

SIR: In compliance with the request contained in your letter of 14th May and of the 21st inst., the enclosed information has been obtained from the several indicated sources, and is transmitted for the use of the Court of Claims in the case of Wm. Geiger *vs.* The United States.

Very respectfully, your obedient servant,

TH. S. JESUP,
Quartermaster General.

JNO. D. McPHERSON, Esq.,
Deputy Solicitor Court of Claims, Washington, D. C.

Report of Lieut. D. P. Hancock.

CAMP NEAR FORT LEAVENWORTH, *May* 31, 1858.

SIR: I have the honor to acknowledge the receipt of your letter, dated May 21, 1858, enclosing a set of questions referring to a claim of one Geiger against the United States.

I am sorry to say that, although the claimant was paid finally by myself, I can give you no information on any of the points desired. I do not think he did any work while I was at the post. I think, however, that he was delayed some four or five months after I came to the post before he received his money, and I believe for a long time before I came to the post. Mr. Geiger got a full affidavit of all the information I possessed on the subject several months ago, and if you will apply for that, (I presume it is at the solicitor's,) all information that concerned his claim that I knew anything about is contained in it. I, myself, am aware of Mr. Geiger having sold orders on the A. A. Q. M. for quite large amounts in consequence of non-payments.

I have now with me no paper or document to give you any information on the points required. I was not stationed at the post at the time he was building the barracks, and cannot give you any definite information on any of the points asked for in the letter. I refer you again to my affidavit before mentioned. I also refer you to Major Hunt, then commanding officer at Fort Washita, and Lieut. A. L. Long, second artillery, then quartermaster at same post, both now belonging to the third column, army of Utah, and also to Capt. J. H. Lendrum, third artillery, also quartermaster when the barracks were constructed.

I am respectfully, your obedient servant,

D. P. HANCOCK,
Second Lieutenant Seventh Infantry.

Major General T. S. JESSUP,
Quartermaster General, U. S. A., Washington, D. C.

A true copy from the original on file in the Quartermaster General's office.

W. H. GORDON,
Chief Clerk.

Report of Lieutenant J. H. Lendrum.

PRESIDIO OF SAN FRANCISCO, CALIFORNIA, *July* 4, 1858.

GENERAL: I have the honor to make the following statement in answer to your letter of May 21st, 1858, received on the 19th of June, in reference to a claim of William Geiger, contractor for building barracks at the post of Fort Washita, Choctaw nation. The contract was made by Captain S. G. French, assistant-quartermaster, U. S. A., October 18th, 1854, at Fort Smith, Arkansas, (184 miles from Fort Washita). Geiger was delayed in his work on account of the post quartermaster not being able to procure lumber to follow up his (Geiger's) work. His principal workmen, if not all, were brought from Fort Smith. The men not being in my employ I have no means of ascertaining the number of days that he was detained, or whether he boarded all his men during the time. At different times I know that during the suspension a number returned to Fort Smith. Geiger was informed by me on several occasions about the time that lumber

would be received. I could give him no positive answer about exact time, as it had to be hauled a long distance, and the probable failure of contractors.

It is not very probable that he would have kept workmen under pay for the time charged or claimed, *one, two, three, or four* months at a time. There *was no time that they were idle two months at the post.* They generally returned to Fort Smith. I consider the claim an extraordinary one.

Very respectfully, your obedient servant,

J. H. LENDRUM,
Brevet Captain U. S. A.

General T. S. JESUP,
Quartermaster General, U. S. A., Washington, D. C.

A true copy from the original, on file in the Quartermaster General's office.

W. H. GORDON, *Chief Clerk.*

IN THE COURT OF CLAIMS.

WILLIAM GEIGER *vs.* THE UNITED STATES.

CLAIMANT'S BRIEF.

The Contract.

On the 18th of October, 1854, William Geiger entered into a contract, at Fort Smith city, with Captain French, of the quartermaster's service, to erect certain parts of a stone barrack at Fort Washita, in the Choctaw nation, 180 or 200 miles distant, to be completed by the 30th June, 1855. Geiger was to build the walls and chimneys of stone, make the door and window arches of brick, rough-cast the walls outside, and plaster them inside, and was to quarry the rock and burn the lime on or near the military reserve of the garrison. The government was to haul the rock and lime to the site, and furnish brick for the arches, and, by contracts with carpenters and other parties, was to carry on the other parts of the work *pari passu* with Geiger. (See contract, pages 4 and 22.)

Performance of contract by claimant.

About the 1st of November, 1854, Geiger, with thirteen workmen, proceeded to Fort Washita, and commenced his operations by quarrying rock and burning lime, and as soon as he had prepared a sufficiency of the materials was ready to commence and carry on the work. (See Hinch's dep., p. 33.)

He soon encountered difficulties which delayed him. The first was a failure of the officer to have the stone, lime, and sand hauled to the site; then the contractor for furnishing materials for the carpenter

failed to deliver joists for the floor; then nails were wanting; then bricks for pillars and chimneys; and by one failure or another of the government, the claimant was kept back from his work in such manner as that he could not complete the job sooner than December, 1856, instead of June, 1855, a period of one year and a half beyond the contract time.

Every witness who has deposed testifies that Geiger was always ready with his hands for work when the work was ready for him. The extraordinary fact is fully proved that, during that ruinous delay, he paid and boarded his workmen when idle as well as when at work; and, although other employers desired his services on profitable work, he refused to tie himself up so that he should be unable to answer a call from the United States. It is proved by Vernon, the superintendent and architect of the barracks, that he always notified Geiger when he could proceed in his work, and that he was always ready at the time specified. It is also proved that, so protracted were the delays, and so high was living at Fort Washita, he removed his workmen back to Fort Smith three times, at a heavy expense, to escape the heavier expense at the former place. With a resolution and perseverance worthy of a better fate, he did not falter until he finished his contract, and delivered the building to the government in good order, as is proved by Lieutenant Hancock, (see p. 14) and Vernon's dep., (p 28.)

It is proved that Geiger could have completed the work in the time stipulated in the contract. He always had a full force employed—sometimes as many as twenty men, and on an average fourteen hands. (Ziegenbein's dep., p. 17; Hinck's, p. 34.) He always had plenty of rock quarried and lime burned, but it was not hauled to the building. (Knoble's dep., p. 29.) He employed a cook, and kept a mess for his hands. When teamsters went to haul rock and lime, he always sent his men to help load. (Ziegenbein, p. 32, and Knoble, p. 30.)

The failure on the part of the government.

The United States, by their proper agent, bound the claimant, under a heavy penalty, to erect, within a fixed time, barracks at Fort Washita, and, in law and justice, were bound themselves to do certain parts of the work, by other contractors, in joint progress with Geiger. He was to prepare a part of the materials, build the walls and chimneys, and plaster the inside walls and ceilings; but he could do no part of his work except supplied by government with the materials, and by the remainder of the work being kept up with his work. These were duties devolved on the government, and it is proved by incontrovertible testimony that it failed to come up to its obligations in every particular. When he had prepared the rock at the quarry, and the lime at the kiln, he had to remain idle, waiting for them to be hauled to the building. When Geiger had progressed with his work until pillars and arches were to be built, he had to wait until government could procure the brick, which by the contract it was to furnish. When Geiger reached the square for the first floor, then he had to wait until the government should have the joists laid; and

even the lack of lathing nails, from a similar failure, caused one of his delays and losses.

When the work was at last finished, in December, 1856, which but for the above delays and failures of government would have been completed in June, 1855, and the unfortunate contractor presented his bill for approval and payment, it was promptly approved by the proper officer; but it required three or four wearisome and expensive journeys to Fort Washita, with delays, one of which was for six weeks, at an expense of two dollars per day, before he could receive the pay acknowledged to be due him. The government signally failed to perform its obligations to Mr. Geiger.

What injury has Geiger sustained by that failure?

That Geiger's workmen were dissatisfied and quarrelled with him because of these delays, under the belief he would not pay them for lost time, and because of his inability to make payments as they desired, was an evil that cannot be estimated in money; but that he should be compelled to pay them for lost time, besides supporting them, and transporting them two or three times to Fort Smith and back again, at great expense, but not greater than it would have been had they remained at Fort Washita, are facts which are exhibited in his accounts, page 7, in dollars and cents. Almost every witness proves the extraordinary fact that Geiger did so pay his workmen. (Atkinson, p. 12; Vernon, p. 16; Ziegenbein, p. 19; Beckel, p. 21; Knoble, p. 30; Hinch, p. 33; Emerich, 17.)

But was it necessary he should thus keep them in pay instead of discharging them until wanted, or hiring others in their stead? It is proved by several witnesses that if he had discharged his workmen their places could not have been supplied at Fort Washita, as there were no workmen in that remote military station; nor could he have procured them nearer than the city of Fort Smith, and probably not there. He was thus compelled to keep those he first employed, or to give up his contract and violate his obligations.

He was also compelled to borrow large sums of money to make payments to his men, and to bear the other expenses incident to their employment, at heavy interest. He was unable to repay those sums when they became due, and thereby suffered in his credit, which to a business man is his life-blood. The rate of interest varied from ten to twelve per cent.

During the whole period ensuing the eight months embraced in his contract, up to 27th April, 1857, he was prevented from engaging in other work, in which he could have had constant and profitable employment. (See Ziegenbein, p. 18; Beckel, p. 21; Atkinson, p. 11, and other witnesses.)

But he not only suffered from these heavy expenses and losses to which he should not have been subjected, but even after the work was completed and approved, and his account passed, he was then kept out of his pay from 31st December, 1856, till 27th April, 1857, nearly four months; during which time he visited Fort Washita several times, and was delayed at heavy expense before he received it.

These various items of claim Geiger has united in an account, to

which he has made solemn oath, and has supported by ample proof. (See page 7.)

1st item.	Loss of time, 5 months, 13 hands—		
	5, at $65 per month.....	$1,625	
	8, at $39 per month.....	1,560	
			$3,185
2d item.	Loss of 3 months, 13 hands—		
	5, at $65 per month.....	975	
	8, at $39 per month.....	936	
	Travel, 13 men, 180 miles, 5 days each trip, at $2 per day each; $20 each man going and returning, $260 each trip; 3 trips.....	780	
			2,691
3d item.	Interest for borrowed money forced on claimant by failure of U. S.....		450
4th item.	Expenses of his own travel, and while waiting for his money.....		230
5th item.	Loss of time and other work for one year and ten months.....		1,000
6th item.	Board of hands and self for 5 months, at $25 each		1,750
			9,306

The court is respectfully referred to Story on Contracts, art. 969, 1021 a, 1022, 1022 c, 1029; Parson's on Contracts, vol. 2, 432, 442, 3, 4; Chitty on Contracts, p. 770, and the various cases referred to.

J. M. McCALLA,
Attorney for Claimant.

IN THE COURT OF CLAIMS.

No. 1565.

WILLIAM GEIGER *vs.* THE UNITED STATES.

BRIEF OF DEPUTY SOLICITOR.

Statement of the case.

The plaintiff contracted to burn lime, quarry stone, and do the mason-work of a stone barrack at Fort Washita, in the Cherokee Nation. The United States were to haul the stone and lime from the places where the same were burned and quarried to the site of the work, and were also to furnish brick for certain parts of the work. All this work was to be finished by the 30th of June, 1855.

The plaintiff was also to furnish lime, and to plaster inside.

It was implied in this agreement that the United States would be ready from time to time with such carpenters' work as necessarily must keep pace with the stone-work.

The work was suspended on several occasions, respecting which there is much discrepancy in the testimony, but according to Knoble, who was foreman of the work, (Record, p. 29,) and who is most exact in his answers, the delays were as follows:

In March, 1855, three days waiting for stone to be hauled.

From June 30th to September 12, 1855, waiting for carpenters' work.

In October, 1855, four days waiting for stone to be hauled.

From October 28 to November 21, 1855, waiting for carpenters' work.

From June 30 to September 30, 1856, waiting for lathing nails.

After each suspension the petitioner recommenced work, and finally completed the building about the middle of December, 1856.

The petitioner alleges that he kept a large force of men under pay during these suspensions, and claims to be reimbursed. He alleges also that he was put to great expense and loss of time in collecting the amount due him from the United States, and claims to be reimbursed.

The particulars of his claim are stated by him under oath, (in the record, page 7,) and may be classed as follows:

Wages and support of men, $3,185 + $2,691 + $1,750.....	$7,626
Loss of business while idle during suspension.....	1,000
Interest on borrowed money	450
Expenses of going to Fort Washita to collect amount due....	230
In all.....	9,360

I. *Several items of the claim are such as cannot enter into the estimate of damages; others are grossly overstated.*

The last two items it is needless to remark upon. They do not arise from any breach of the contract by the United States, and have nothing to do with the contract.

He charges for the support of his men when idle, eight months. (Record, p. 7, and Brief, p. 3.) His foreman, Knoble, who worked from first to last, swears the work was suspended only five whole months and forty-two days—say six months and twelve days, besides suspensions from inclemency of the weather, and for want of mortar, boards, and scaffolding, with which the United States had no concern. Knoble cannot be mistaken in this, for he verifies it by further proving the time during which he worked.

He has charged wages of some hands at $65 per month, and none less than $39; yet Hinch (Record, p. 33) says his wages were only $20 per month.

He has charged full wages during all the suspensions. Ziegenbein (Record, p. 32, 4th ans.) says Geiger did not pay him wages during the suspensions, and Hinch says that during part of the time he was

engaged in loading wagons and quarrying rock—*i. e.* as to him the work was not suspended at all. Again, during the suspensions of three days in March and four days in October, waiting for stone to be hauled, Geiger's men, or some of them, were, as Hinch was, employed in loading the wagons, (Ziegenbein's answer to 4th cross-interrogatory, Record, p. 32,) and for this service Geiger was paid, (Record, pp. 6. 44.) He cannot charge for time lost by these men thus employed.

He charges for the entire eight months for the pay and expenses of thirteen men. Vernon (7th ans., Record, p. 27) says that during one of the suspensions, Geiger had but nine men employed. It is true, the evidence is that he had more hands on an average employed on the building. This may be so, and yet he may not have had as many as thirteen on an average idle during the suspensions.

II. *All the delay was not chargeable to the default of the government; a portion was incident to the nature of the work, and the government had a right to take time to execute its part.*

It would be impossible in constructing any building that the mason-work should go forward without interruption. Masons must stop while carpenters lay and level the joists, and set door and window-frames in each story. No doubt there was some unusual delay at each of the two stories, but some delay was unavoidable, and the government was not in default for the whole time.

This remark particularly applies to the delay from June 30 to September 12, 1856, when Knoble says they were waiting for lathing nails. After the completion of the mason-work, a considerable time is required to get ready for plastering. The roof is to be put on, the floors laid, and the rooms divided off by stud partitions, with the necessary doorways. This portion of the work consumes always a large amount of time—often a fifth of the whole time.

Supposing the largest force of mechanics that could be employed to advantage to be engaged in constructing a building, it would be far within bounds to say that the carpenters must have exclusive possession one-fourth of the time, and the masons and plasterers three-fourths.

But Geiger does not in a single instance allow the government a moment of time to perform acts which necessarily required weeks and months. Whenever the carpenters exclude him, he charges the lost time against the United States. With almost the same propriety might we charge that all the time Geiger's masons were at work they hindered our carpenters from laying joists, putting on roofs, and making floors.

III. *The petitioner has incurred unnecessary and unreasonable expenses not consequent upon any breach of the contract by the United States, and cannot be suffered to make the government bear the consequences of his own folly.*

According to the allegations of the petition work was suspended on three several occasions. And he knew that the work would not be resumed for a considerable time in each case. It was unreasonable

and unnecessary to keep mechanics idle under pay for one, two, and three months at a time. It is said they were in the Indian country, and had he discharged his men he could not have replaced them; but this is contradicted by the petition itself, which alleges that the men did return to their homes at Fort Smith, and there, too, they were continued under pay. No necessity is shown for continuing them under pay in the place where they were originally hired, (Fort Smith,) where they were hired, and where they could have been replaced if discharged.

But under the terms of the contract itself the government is not liable for any delay between the completion of the mason-work and the necessary preparation for plastering; or, as it is stated in the testimony, while Geiger was waiting for lathing nails. The agreement for plastering was a distinct contract from that to lay stone. By that agreement Geiger undertook to plaster the house when it should be ready. There was no covenant on the part of the United States to get it ready by a specified time. No time is even referred to. There is no reason arising out of the contract why Geiger's masons who built the walls should stand by idle while the government was preparing the house to be plastered. This part of the contract must be viewed just as if the government had contracted with any other party to plaster the house when ready. The government was bound to notify the contractor when the house was ready, and the contractor was not bound to move till so notified. This is the doctrine of the text books.

IV. *The petitioner has, by his own acts, waived any cause of action against the United States on account of the delays alleged in the petition.*

When the several suspensions of work for want of lumber took place, Geiger was informed, as nearly as could be, when he would be required to resume. (Rec., p. 38.) He made no complaint of the delay, and when the work was ready he resumed. The question has been particularly propounded to all the government officers to whom complaint should have been made, (Record, p. 36,) and no one reports any complaint from him. If dissatisfied with the delay, he should have notified the government officer; not having done so, and having accepted the performance of its part by the government, he cannot maintain an action now for breach of covenant. (Carpenter *vs.* Blandford, 3 Man. and R., 93; Baldwin *vs.* Farnsworth, 10 Maine, 414 See as to enlargement of time by parol, Watmough *vs.* Hodges, 6 Harris and J., 38; Cox *vs.* Bennett, 1 Greene, 167; Keating *vs.* Price, 1 John. Ca., 22; Ratcliffe *vs.* Pemberton, 1 Esp., Ca., 34.)

The only authority to sustain this action which I can find, is in Story on Contracts, § 15, in which he says, that where the labor or expense of doing work is enhanced by acts of negligence or omission of either party, an implied promise of indemnity arises; but in the cases cited for this doctrine, I find none to support it, except a slight remark in Damon *vs.* Granby, 2 Pick., 345.

V. *Character of the allegations and evidence.*

The evidence in this case fails, in a marked degree, to support the allegations of the petition, and the witnesses, to a singular extent, differ among themselves.

The petition alleges a total delay of eight months; Vernon, the architect, (pp. 14, 26,) makes, at a maximum, 7½ months; Ziegenbein (p. 18) makes 5 months; Atkinson, who worked on the building and was an eye-witness of nearly every transaction, (p. 10,) knows only of 2½ months' delay.

The same difference exists with regard to the times of suspension. Vernon, the superintendent of the building, employed by the government, was examined for the petitioner; Knoble, foreman of the masons, employed by petitioner, was examined for the defence.

Vernon says Geiger was delayed all September, 1855. Knoble says he himself worked from the 12th of September through that month. Vernon states as part of the delays a period from the last of December, 1855, to February 20, 1856 Knoble says he worked all this time except, perhaps, 14 days. Knoble states a delay from October 28 to November 21, 1855, which Vernon does not mention.

The allegation in the petition, that Geiger returned to Fort Smith with fourteen men, under wages, three several times, is disproved by the testimony. (Vernon's dep., p. 27, answers 4, 7, 10; Knoble, p. 29, answer 3; Ziegenbein, p. 31, answer 3; Hinch, p. 33, answer 3.)

The stone work was to have been completed June 30, 1855, but was not completed till June 30, 1856. In this whole year the period of delays charged are only five months, and not more than three months are proved, including the time necessarily occupied in laying joists, &c. The contractor thus had twice as much additional time given him as would cover all delays.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

WILLIAM GEIGER *vs.* THE UNITED STATES.

LORING, J. delivered the opinion of the court.

In this case the petitioner alleges a contract made at Fort Smith, in Arkansas, on the 18th day of October, 1854, between him and the United States for the stone work of a barrack at Fort Washita, Choctaw Nation. By the contract the petitioner was to quarry the stone, and burn the lime, and lay the foundation, and erect the stone work, and plaster the walls and ceilings on or before the 30th of June, 1855. The United States were to haul the materials, such as stone, lime, sand, &c., from their place of preparation, near the building, to its site.

The work contracted for by the petitioner was completed and ac-

cepted by the United States December, 1856, and the contract price for the work has been paid by them.

But the petitioner alleges that he was delayed in the performance of his work by the repeated and protracted delays on the part of the United States in the hauling of materials and in the doing of the carpenter's work of the building; that these delays amounted in all to about eight months, during which he was obliged to support and pay his workmen, and to transport them to and from, between Fort Smith and Fort Washita, as it was impossible to dismiss them and to supply their places in that remote and unsettled country.

The petitioner also alleges that after the United States had accepted his work, they delayed the payment of the contract price for several months, whereby he was compelled to pay interest for money wherewith to pay his workmen, and was put to expense in endeavoring to collect the money due him, and became embarrassed in his affairs and was injured in his credit and business.

It is objected to this claim that the petitioner did not complain of the delays, when they took place, to the officers of the United States at Fort Washita, and that thereby and by subsequently receiving the contract price he has waived any cause of action he might have had against the United States.

But we think no such inference can arise between the parties. Neither the officers at Washita nor any other officers of the United States were their agents to take notice of such complaints or of a claim for damages, or of a demand therefor, and no notice to, or demand on, such officers would have altered the rights or liabilities of the United States, or been of any legal effect whatever. Then as to the receipt of the contract price, all payments by the United States are made on appropriations authorized by law, and there was no legal authority for the payment of anything more than the contract price, and the receipt of that cannot be held to be a waiver of a claim for damages which there was no existent judicial authority to adjust or pay, and the payment of which depended on future legislation.

Suspensions of the stone work, because of delays on the part of the United States, are proved by witnesses twice examined in the case; first by their depositions taken on the part of the petitioner, and again by their depositions taken on the part of the United States. Of these deponents, Knoble, who was foreman of the petitioner, and Vernon, who superintended the work for the United States, fix the dates and duration of the delays with great precision; and it is apparent, though not expressly stated, that Knoble kept a memorandum of his days' work, and testifies from it, for he states all their dates confidently. His testimony is given with apparent fairness, and he is justly credited by the deputy solicitor of the United as being the most reliable witness.

On page 30 of the record, after having specified the suspensions that took place in Geiger's work from the delays and omissions of the United States, he states: "During the rest of the time I was at work, with the exception of four days, when I was sick, which Mr. Geiger did not pay me for." He then gives a tabular statement of his work: "I worked from the 14th November, 1854, to the 15th March, 1855; from the 19th March, 1855, to the 30th June, 1855; from the 12th

September, 1855, to the 5th October, 1855; from the 9th October, 1855, to the 28th October, 1855; from the 21st November, 1855, to the 30th June, 1856; from the 30th September, 1856, to the 15th December, 1856." And with this specific statement of dates his testimony of the suspension of the work from the delays of the United States corresponds.

The whole evidence shows that there were two suspensions of the work from the delay of the United States in hauling stone; two suspensions "for want of carpenter's work," and one "for want of lathing nails;" the duration of each is fixed as follows: For delay in hauling stone, &c., first time in March, 1854, 3 days; second time in October, 1855, 4 days.

Of these Knoble says, (p. 29,) answer 2d: "There were twice that the work was suspended for want of having the rock and lime hauled to the place of building; *first time in March*, 1855, *about three days*."

Vernon says, p. 26: "When I arrived at Fort Washita, I saw Mr. Geiger, who had several hands in his employ all idle, and it was some three days before they were able to get at work, on account of the rock and lime not being hauled; the same being about two miles from said garrison."

Of the second suspension for want of rock and lime, Knoble, says, answer 2d: "*Second time, in October*, 1855, *four days for want of rock*."

Vernon does not mention this second delay of four days, but (p. 27) refers to a suspension for the same cause from about the last of December, 1855, to 20th February, 1856, but his recollection is impugned in this particular by the statistical statement of Knoble.

The testimony proves two suspensions from delay in the carpenter's work, thus: First time from June 30, 1855, to September 12, 1855; second time from October 28, 1855, to November 21, 1855.

Of the first Knoble says, answer 2d, p. 21: "The work was suspended for want of carpenter's work twice, the first time from June 30, 1855, to September 12, 1855.

Vernon says, answer 2d, p. 27: "The petitioner was obliged to suspend work a second time for the space of two months or more on account of there not being joist and other timbers necessary on hand, as also bricks for pillars and chimneys. This suspension was, as well as I can recollect, in July, 1855, and until about the middle or last of September."

As to the second suspension from delay in the carpenter's work, Knoble, p. 29, answer 2d, states: "*second time from October* 28, 1855, *to November* 21, 1855."

Vernon omits this suspension, but Ziegenbein and Hinch testify to two suspensions for delay in the carpenter's work, though they testify differently and without confidence as to dates.

As to the suspension of the work of the petitioner because lathing nails were not furnished, Knoble, answer 6th, p. 30, states: "In addition to the time lost in consequence of the suspension of the work, as above stated, there was from the last of June, 1856, to the last of September of the same year a suspension of time on account of not having nails for lathing:" and his statement of the dates of his work

shows that this suspension was from the 30th of June to the 30th of September; and that it was the last suspension.

Vernon says as to this, when asked "if the petitioner was obliged to suspend work a fourth time, for the space of three or four months, by the failure of the United States to perform some act which they ought to have performed, p. 28:

Answer (8.) Yes; the work was suspended on or about the 1st of July, 1856, for the want of lathing nails, which the government was to furnish.

Ziegenbein testifies to a suspension "on account of there being no lathing nails on hand," though he mistakes the date as "in the spring of 1856."

Ziegenbein, answer 6, p. 32, testifies: "In the winter of 1855–'56 Geiger and all of the hands stopped work on account of the inclemency of the weather," but this is shown to be incorrect by Knoble's statement of dates of suspensions.

On the whole evidence, therefore, we find the suspensions of Geiger's work, caused by the delays of the United States, amounted to six months and a half.

The United States allege that in the construction of a building there must be necessarily some delay from the necessary interference of workmen with each other, as carpenters with masons; that this is unavoidable, and that the government therefore could not have been in default the whole time, and that Gieger has charged the whole time as the default of the government.

And these considerations are applied by the deputy solicitor particularly to the time when it is said that the work was delayed for lathing nails, as "after the completion of the mason work a considerable time is required to get ready for plastering," (Sol. br., § III, p. 2,) and it is said the carpenters must have exclusive possession one-fourth of the time.

This is suggestion, and not evidence, and facts that are relied upon or are to be used, must be proved by evidence; when they are not so proved, the want of evidence is to bear most strongly against the party which should have produced it, which in this case is the United States. Moreover, the testimony is that the delay as to lathing nails was for the want of them, and not while they were used. But for unavoidable interference and delays, some time should be allowed, and we think one month is, under the circumstances of the nature of the building, &c., sufficient; this reduces the time to five months and a half.

It is also urged by the United States that the contract for plastering was a separate contract from the stone work, and that Geiger had no right to keep his men at the expense of the government from the time the stone work was done till the plastering was ready. We think this is not so, and that from the situation of the parties, and from the contract itself, it is the inevitable conclusion that they considered the agreement for stone work and plastering parts of the same contract, and that the latter would not have been made except jointly with the other; there is no evidence that the whole lathing must have been finished before the plastering began, nor ground for

inferring it; or that the time between when the stone work was completed and the lathing was ready for the beginning of the plastering was necessarily such as to require the dismissal of the men in that country, and under the circumstances shown in the case.

It is said also that there was no covenant on the part of the United States to get ready for the plastering in any specified time, but we think this is not so; a time was fixed by the contract for the completion of the work, and a covenant on the part of the United States to do what was to follow the stone work and precede the plastering, *within a reasonable time*, was an implication of law.

Then the petitioner charges for thirteen men under wages during these suspensions. B. F. Atkinson, 2 answer., p. 11, states "that the said Geiger had in his employment in the erection of said barracks at Fort Washita thirteen men." Thomas Vernon, answer 2, p. 15, states "that said Geiger had thirteen men employed on said barracks."

Jacob Ziegenbein, answer 2d, p. 17, states "that William Geiger had employed on said work thirteen or fourteen hands on an average; he sometimes had as many as twenty men employed on it."

George Hinch, p. 34, 4th interrogatory, being asked how many hands did Mr. Geiger have employed to work on the building, said: Answer. From twelve to fifteen.

But it appears from Ziegenbein's testimony that he left the work on the 7th or 8th of November, 1854, and remained absent until about the 10th of September, 1855. And it appears from Hinch's testimony that he left the service of the petitioner and entered the service of the United States on the third suspension of the work, which was October 5th, 1855. And then it appears that during the first and second suspensions he was at work "engaged in helping the teamsters load the rock at the quarry." This was done under the "additional agreement made November 1st, 1854," p. 6, and was payable under it at 25 cents per perch, and apart from the contract for laying stone, &c., and it has no connexion with the suspension alleged; and as to Hinch there was no suspension.

There are, therefore, only twelve men for whose wages the petitioner can claim.

As to the rates of the wages: The petitioner charges, p. 7, "five of said men at $65 per month, and eight of said men at $39 per month;" but the testimony in the case does not support the charge of "five of said men at $65 per month."

Knoble testifies, ans. 4, p. 30, "my wages was three dollars per day."

Hinch testifies, ans. 4, p. 33, "Geiger paid me $20 per month."

B. F. Atkinson, ans. 2, p. 11, states, "thirteen men; their wages per day was two dollars each"

Thomas Vernon, ans. 2, p. 14, says "Geiger had thirteen men at the expense of two dollars per day wages."

Ziegenbein, ans. 2, p. 17, says the men were employed "at wages of two dollars per day."

And this is all the testimony as to the rate of wages. For eight men the petitioner, according to his own statement, can claim but $39

per month, and if Hinch is excluded and Knoble taken at $3 per day according to his testimony, there remain two men to be charged at the rate of two dollars per day, of whom Zeigenbein is one.

Then eight men, at $39 per month, for 5½ months, is.....	$1,616
Knoble, at $3 per day, for 5½ months.....	495
One man, at $2 per day, for 5½ months.....	330
Ziegenbein, after he returned to work, about September 10, there were 116 days, of suspension, deduct 19 days, as the proportion within a fraction of the unavoidable delays, and there remain 97 days, at $2 per day.....	194
Total wages.....	$2,635

As to the expense of board, Atkinson, Vernon, and Ziegenbein, in answer to the 2d interrogatory in their depositions taken for the plaintiff, state the expenses of boarding at the rate of from twenty to twenty-five dollars per man. But in answer to the 6th interrogatory in the same depositions, Atkinson and Ziegenbein state the expense as at from twenty-five to thirty dollars per month; but Vernon, in his 6th answer, says, (p. 11,) "the expense of subsistence at Fort Washita, between October, A. D. 1854, and November, 1856, was, by boarding, say (15) fifteen dollars per month per man, and by purchasing supplies and furnishing one's self, from fifteen to twenty-five dollars per man."

But it appears from Knoble's testimony that board at Fort Smith, 170 or 180 miles from Fort Washita, was about twelve dollars per month, (ans. 4th, p. 30;) and the evidence shows, p. 6, that Geiger was authorized to draw ten rations per day for his men at the government prices, and therefore it is reasonable to take the lowest statement of his own witnesses, and that is the specific statement of Vernon in his 6th answer cited above, fixing the rate of board at fifteen dollars per month for each man.

As Geiger's own board is to be included, there are twelve men, at $15 per month, for five and a half months.....	$990 00
Hinch, for two months and eighteen days.....	39 00
Ziegenbein, for three months and seven days.....	48 50
	$1,077 50

Mr. Geiger is entitled to be paid also for his own time during the suspensions, and at $3 per day.....	$495 00

Upon the preceding calculations the petitioner would be entitled to receive for expenses and damages:

For wages paid his men.....	$2,635 00
For board of men and himself.....	1,077 50
For his own time.....	495 00
	$4,207 50

The United States allege that during the time of the suspensions some of Geiger's men were employed in loading stone, (Ziegenbein's deposition, 4th cross-interrogatory, p. 32,) and that Geiger has been paid for that, (pp. 41, 44, and 45.) It is not shown how many men were so employed, nor for what time any were, but it is evident Geiger is not to be paid for the time of his men twice during the suspensions. Now the record (p. 44) shows that Geiger was paid for hauling stone $540 44, from January 14, 1856, to September 30, 1856, the term of 252 days. During that time there were 92 days of suspensions, and if a proportional part of the payment is deducted, it reduces the amount due Geiger by $196 88.

It is not shown that Geiger received any more for loading stone, except the $4 50 specified in p. 41, and it does not appear that that was secured during any suspension.

If from the amount found due to him above ($4,207 50) there is deducted $196 88, there remains a balance due him of $4,010 62, and to that amount he is entitled to relief.

The petitioner claims the expenses of transporting his men to and from Fort Smith. The necessity of this is not shown by the evidence, and Vernon states his expenses were not greater thereby than if he had remained at Fort Washita; and, if they were, he had no right to incur them. He was bound to support his men in the cheapest way during the suspensions, and cannot claim for more.

The petitioner claims also his own expenses in travelling to and remaining at Washita, while seeking payment of his money, after his work was accepted. But this is not a consequence of the breach of contract declared for, but a remote consequence of the default of the United States, for which there is no legal liability.

The claim for interest cannot be allowed.

A bill will be reported to Congress for ($4,010 62) four thousand and ten dollars and sixty-two cents.

Report of Quartermaster G. P. Andrews.

BENICIA DEPOT, *California*, *July* 17, 1858.

SIR: Your communication dated May 21, 1858, was received on the 1st int., but could not be answered by the return mail, because it was necessary first for me to visit the Presidio of San Francisco, and examine the copy of Wm. Geiger's contract, which is in possession of B't. Capt. Lendrum.

I have now the honor to report as follows: The narrative prefacing the questions by the Solicitor of the Court of Claims, states that "The United States were to do all the carpenter's work and to *haul* stone and lime and other materials." My recollection is, that the contract did not at first provide for any *hauling*. The word used was "*furnish*;" and the first dispute between Geiger and myself occurred when he claimed that I should haul the stone that he had quarried. This

was about December 25th, 1854. Geiger then rode from Fort Washita to Fort Smith, about 185 miles, saw Quartermaster French, and obtained an additional explanatory article, which is on the third page of his contract, declaring that the United States should do all the hauling. He was gone about two weeks, during which time his men could have continued to quarry stone, and my impression is that they did; for they had not quarried enough to make the entire walls of the building.

Afterwards we had another dispute about loading the wagons, which was arranged by my agreeing to pay him for loading them so much per perch, (see contract.) I think that agreement was ante dated for some reason that I have forgotten. This second dispute caused a delay of two days in hauling, during which his men could have continued their work.

I was relieved from duty as A. A. Q. M. at Fort Washita, on the 28th of February, 1855. At that time, Geiger had not laid the foundations, and consequently could not have been delayed for any carpenter's work. After I was relieved I took no further notice of the progress of the work than any other indifferent person. My memoranda and retained accounts were deposited for safety at my home, before I returned to California, and I am unable, without reference to them, to make any further statement than the above, which is to the best of my recollection. I judge, from my knowledge of Geiger's disposition, that he would not have presented such an improbable claim, had he not been aware of the resignation of Capt. French, and that the other persons who had anything to do with that contract have been stationed at such remote posts as to make it possible for the claim to be adjudicated without their evidence. Three years and three months have elapsed since I was relieved, and he has never hinted to me that my evidence might be needed in his favor.

Very respectfully, your obedient servant.

GEO. P. ANDREWS,
Regimental Quartermaster 3d Artillery.

Major General THOS. S. JESUP,
Quartermaster General U. S. A.

A true copy from the original on file in the Quartermaster General's office.

W. H. GORDON, *Chief Clerk.*

Copies of bills of Wm. Geiger paid.

The United States to William Geiger,	*Dr.*
June, 1855—For 89 feet of chimney on old quarters, (officers) at $4 per foot.....	$356 00
184 feet cut stone for fire-places in officers' quarters, at $75 per foot.....	137 60
Repairing old fire-places, in commanding officer's quarters, moving columns under commanding officer's quarters.....	21 00
	$514 60

I certify that the above account is correct, and that the work was performed as above stated, and necessary for the public service.

J. H. LENDRUM,
Brevet Captain United States army, Acting Quartermaster.

A true copy from the original.

W. H. GORDON,
Chief Clerk Quartermaster General's office.

Received, Fort Washita, C. N., June 24, 1855, of Brevet Captain J. H. Lendrum, acting assistant quartermaster United States army, five hundred and fourteen dollars and sixty cents, in full of the above account.

WILLIAM GEIGER.

The United States to William Geiger, *Dr.*

Jan. 14, 1856—For building 463 perch stone walls, at $3.25 per perch.....	$1,504 75

I certify on honor that the above account is correct and just; that the services were rendered as stated, and that they were necessary for the public service.

J. H. LENDRUM,
Brevet Captain United States army.

Received, Fort Washita, C. N., January 14, 1856, of Brevet Captain J. H. Lendrum, 3d artillery acting assistant quartermaster United States army, fifteen hundred and four dollars and seventy-five cents, in full of the above account.

WILLIAM GEIGER.

A true copy from the original.

W. H. GORDON,
Chief Clerk Quartermaster General's office.

The United States to William Geiger, *Dr.*

Nov. 25, 1856—To cutting 355 feet stone steps, at 75 cents per foot.....	$266 25
Laying 18 perch stone, at $3 25 per perch,	58 50
Loading 18 perch stone, at 25 cents per perch.....	4 50
	$329 25

I certify that the above account is correct and just, and that the services were rendered as stated, and that the account has never been paid.

D. P. HANCOCK,
2d Lieutenant 7th Infantry, Acting Assistant Quartermaster.

Received, Fort Washita, C. N., April 27th, 1857, of 2d Lieutenant D. P. Hancock, 7th infantry, acting assistant quartermaster, the sum of three hundred and twenty-nine dollars and twenty-five cents, in full on the above account.

WILLIAM GEIGER.

A true copy of the original.

W. H. GORDON,
Chief Clerk Quartermaster General's office.

The United States to William Geiger. *Dr.*

March 10, 1855—For building thirty-one perches of stone wall, at $3 25, under contract of October 18, 1854, for erecting the walls for soldiers' barracks at Fort Washita, C. N..... $100 75

I certify that the account is correct; that the work has been performed as charged and correct.

J. H. LENDRUM.
Brevet Captain U. S. A., A. A. Q. M.

Received, Fort Smith, Arkansas, March 10, 1855, of Capt. S. G. French, assistant quartermaster United States army, one hundred dollars and seventy-five cents, in full of the above account.

WILLIAM GEIGER.

A true copy from the original.

W. H. GORDON.
Chief Clerk Q. M. G. office.

Credited to Lendrum on his explanation.

The United States to William Geiger. *Dr.*

December 31, 1855—For building 246 perches of stone wall, at $3 25 per perch..... $799 50

I certify on honor that the above account is correct and just; that the services were rendered as stated; and that they were necessary for the public service.

J. H. LENDRUM,
Brevet Captain U. S. A.

Received, Fort Washita, C. N., December 31, 1855, of Brevet Captain J. H. Lendrum, acting assistant quartermaster United States army, seven hundred and ninety-nine dollars and fifty cents, in full of the above account.

WILLIAM GEIGER.

A true copy from the original.

W. H. GORDON,
Chief Clerk Q. M. G. office.

The United States to William Geiger. *Dr.*

August 30, 1855—For ninety-two and one-third perches of stone wall, at $3 25 per perch..... $300 00

I certify on honor that the above is correct and just; that the services were rendered as stated; and that they were necessary for the public service.

J. H. LENDRUM,
Brevet Captain U. S. A., A. A. Q. M.

Received, Fort Washita, C. N., August 30, 1855, of Captain J. H. Lendrum, acting assistant quartermaster United States army, three hundred dollars in full of the above account.

WILLIAM GEIGER.

A true copy from the original.

W. H. GORDON.
Chief Clerk Q. M. G. office.

The United States to William Geiger. *Dr.*

May, 1855—For building thirty-two perches stone wall on barracks, at $3 25 per perch, per contract of October 18, 1854..... $104 00

I certify that the above account is correct; and that the wall, as above stated, has been erected in pursuance of contract.

J. H. LENDRUM.
Brevet Captain U. S. A., A. A. Q. M.

Received, Fort Washita, C. N., April 17, 1855, of Brevet Captain Lendrum, 3d artillery, acting assistant quartermaster United States army, one hundred and four dollars, in full of the above account.

WILLIAM GEIGER.

A true copy from the original.

W. H. GORDON.
Chief Clerk Q. M. G. office.

The United States to William Geiger. *Dr.*

April 25, 1855—For building five hundred and fifty-five perches of stone wall on soldiers' barracks, at Fort Washita, C. N., at $3 25 per perch, $1,803 75

I certify that the above account is correct; and that the wall has been erected; and that the account is correct and just.

J. H. LENDRUM,
Brevet Captain U. S. A., A. A. Q. M.

Received, Fort Washita, C. N., April 25, 1855, of Brevet Captain Lendrum, 3d artillery, acting assistant quartermaster United States

army, eighteen hundred and three dollars and seventy-five cents, in full of the above account.

WILLIAM GEIGER.

A true copy from the original.

W. H. GORDON,
Chief Clerk Q. M. G. office.

The United States to William Geiger, from 14*th January* 1856, *to* 30*th of September*, 1856, *Dr.*

For 856 perches 13 feet masonry, at $3 25 per perch,.....	$2,784 56
For 2,161 perches 12 feet loading, at 25 cents per perch,	540 44
For 1,931¼ feet of cut stone, at 75 cents per perch foot,...	1,448 43
For labor 20 days, at $2 50 per day,.....	50 00
For services for team and teamster, 43 days, at $3,.....	129 00
For 963 yards plastering, at 35 cents per yard,.....	337 05
For excavation per agreement,.....	155 00
For 7 feet chimney, at $4 per foot,.....	28 00
For delivering 57 perches of stone, at $1 per perch,.....	57 00
For repairing chimneys, fire-places, steps, &c.,.....	106 00
	5,635 48

I certify that the above account is correct and just, and the work was executed and services rendered in compliance with agreement made with Capt. S. G. French, assistant quartermaster, on the 18th of October, 1854, and subsequent agreement with Brevet Major G. P. Andrews, third artillery, acting assistant quartermaster, and myself.

J. H. LENDRUM,
Brevet Captain United States Army.

Received, Fort Washita, Choctaw Nation, April 27, 1857, of second Lieut. D. P. Hancock, 7th infantry, acting assistant quartermaster, the sum of five thousand six hundred and thirty-five dollars and forty-eight cents, in full on the above account.

WM. GEIGER.

A true copy from the original.

W. H. GORDON,
Chief Clerk Quartermaster General's office.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 243.

ABRAHAM MARTIN.

FEBRUARY 11, 1860.—Reported from the Court of Claims, committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

ABRAHAM MARTIN *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documents from the House of Representatives returned to that House.
3. Certified copies of papers from the Treasury Department, transmitted to House of Representatives.
4. Claimant's brief.
5. United States solicitor's brief.
6. Opinion of the court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, at Washington, this 5th day of December, A. D. 1859.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

ABRAHAM MARTIN *vs.* THE UNITED STATES.

To the honorable the judges of the Court of Claims:

The petition of Abraham Martin, of the city of Philadelphia, respectfully represents: That from the first of January to the first of November, A. D. 1846, and from the first June, 1849, to the first July, 1853, he was the cashier in the custom-house at Philadelphia,

and for many years prior to the term first named he had been such cashier, in the faithful and arduous discharge of the duties of his said office. In the year 1837 the collector of this port made application to the Secretary of the Treasury for authority to distribute among his clerks an amount equal to the surplus fees erroneously paid into the treasury in the year 1832, so as to make their salaries equal to the salaries of the clerks of the New York custom-house performing similar service. The Secretary, in his reply, remarked that he had not the power to grant such authority, but would recommend the subject to Congress, which he did, and Congress passed an act (2d section of the act 3d March, 1837, of the civil and diplomatic appropriation bill) to pay the salaries for that year on the same principle as at New York. By the passage of this act, the salaries of all the clerks, including that of your petitioner, were increased, the highest to $1,400. The amount of surplus fees paid into the treasury in 1832 was found sufficient to place all the clerks on a footing with the clerks in the New York custom-house, with the exception of the cashier. A second application was made by the collector to the Secretary, to authorize an increase of the cashier's salary, so as to make it equal in amount to that paid to the same officer in New York and Boston. The Secretary replied, as he had on a former occasion, that he had not the power, but said, "should there prove to be any *surplus* fees at the end of the year, the proposed increase might be made therefrom." The fees being found adequate, the amount of $1,300 was charged in the accounts at the end of the year, and allowed by the accounting officers of the Treasury Department, making the compensation of your petitioner $2,700 In 1838 the additional salary was charged in the amounts and allowed for that year. In 1839 Congress appropriated $15,000 to pay the arrears of all the salaries in the Philadelphia custom-house from 1832 to 1837, so as to make the same equal to what they received in the last-mentioned year, on the same principle as had been applied at New York, (1st section of the act 3d March, 1839, 5 Stat., 347,) thus affirming the correctness of the decision of the Secretary of the Treasury in placing the salaries on the same footing at the two ports. The sum thus appropriated proved insufficient to effect the intentions of Congress, and on March 3, 1841, (5 Stat., 432,) that body passed a second act, directing the Secretary of the Treasury to ascertain and pay the deficiency. Thus the salary of the cashier at the said port of Philadelphia was placed, by the decision of the Treasury Department, and by the acts of Congress referred to, on the same footing with the cashier of the New York custom-house. From 1832 to the close of 1845 the full salary of $2,700 per annum was paid, with the full consent of the Treasury Department. That subsequent to said period the Treasury Department failed to pay your petitioner the amount due him according to law and the decision of the Secretary—that is, for the period first above stated—the said petitioner having been removed from his said office on the 1st of November, 1846, and restored to his said office on the 1st June, 1849.

Your petitioner would further show, that for more than twenty-seven years he was in the discharge of the duties of said office, faithfully and to the satisfaction of the Treasury Department and of the

public, and during that period had charge of more than one hundred millions of the public funds; and that while in New York the cashier had had a number of assistants, whose compensation in the aggregate, he is informed, amounted annually to $10,000, and in Boston to $4,000; and that he had no authorized assistant in the discharge of the duties of his position. He would further show, that since the compensation of your petitioner was fixed by the acts of Congress above referred to the duties of his office had greatly increased, arising from the large increase of importations.

Your petitioner, confident that he had rendered ample service for the compensation, and his own views as to the strictly legal validity of his claim having been confirmed by the opinions, in writing, of Hon. John Sargeant, George M. Dallas, Henry Gilpin, and James Bayard, he has made repeated applications to the treasury for relief, but without success.

The following is a statement of his claim:

For his services as cashier of the Philadelphia custom-house from 1st June, 1849, to 1st July, 1853, four years and one mouth, at the rate of $2,700 per annum, being the rate allowed to the cashier by authority of the Secretary of the Treasury and acts of Congress.....	$11,022	52
This amount short paid from 1st January to 1st November, 1846, having been paid at the rate of $1,400 instead of $2,700 per annum.....	1,083	33
	12,105	85
Deduct amounts received from 1st June, 1849, to 1st July, 1853, as will appear by reference to the accounts of emoluments of collector of Philadelphia.....	6,265	38
	5,840	47

Your petitioner has not assigned his claim, or any part of it, but is the sole owner of the same.

The following has been the action of Congress on the claim, viz:

The petitioner's memorial was presented in March, 1854, and referred to the Committee on Commerce. No action was had thereon, and he is not aware that anything further was done in the case.

Your petitioner prays your honors to inquire into the matters aforesaid, and to grant him adequate relief in the premises.

ABRAHAM MARTIN.

To the Senate and House of Representatives of the United States in Congress assembled:

The memorial of the undersigned respectfully shows: In pursuance of an application of the collector of Philadelphia in 1836 to the Sec-

retary of the Treasury on behalf of his clerks, which was referred by the Secretary to Congress, the following proviso was passed in the second section of the civil and diplomatic act of 3*d March*, 1837:

"*Provided, however*, That the Secretary of the Treasury be authorized to extend to the collectors of such other ports, when a surplus of emoluments have been accounted for and paid into the treasury in the year 1832, the privilege granted to the collector of New York, to take effect from the first day of January last." Under this authority the Secretary directed the collector of Philadelphia to distribute among his clerks, for the year 1837, *the surplus paid into the treasury in* 1832. Under the first proviso of said section the collector had placed at his disposal, for the *payment of his clerks' salaries*, the amount of fees and emoluments which he would have received "on importations in the year if the act of 14th July, 1832, had not gone into effect." Under these provisos the clerks received their *stipulated maximum compensations for the year* 1837. By the first section of the civil and diplomatic appropriation act of 3d March, 1839, and the fourth section of the civil and diplomatic act of 3d March, 1841, Congress appropriated a sufficient sum to make up said stipulated compensations from 1832 to 1837, which salaries, thus approved and recognized by Congress, have been continued and paid since 1837.

On the 12th of October, 1837, an application was made by the collector "to increase the compensation of his cashier and bond clerk so as to make his salary equal in amount to what is received by persons holding similar situations in New York and Boston." The Secretary in reply, October 24, 1837, authorized the proposed increase to be made at the end of the year, should the emoluments of the office admit of it. Under this authority, there being sufficient emoluments, "according to the importations of the year," made the proposed increase, which was continuously allowed at the close of each year, and paid down to the end of 1845. The first of November, 1846, the cashier was removed, and the additional compensation for the fractional part of said year was not paid. Some time after his restoration, 1st June, 1849, when he applied for the additional compensation, objections were raised by Mr. Rockwell, then Commissioner of Customs, founded on his views of the seventh section of the act for the relief of Charblain and Pouwert, commonly called "the relief section," approved July 21, 1840, which he considered as having been repealed; whereas, if such repeal had actually taken place, it could have in no way affected the cashier's stipulated compensation, authorized and paid as heretofore stated, for when the compensation of the clerks in the custom-house was provided for out of the treasury in 1850, no diminution of their salaries was designed, nor was any such intimated by the Secretary in reference to any clerk in the Philadelphia custom-house. The *stipulated salaries of all the clerks of the Philadelphia custom-house have continued to be paid to the present time*, with the *exception* of the *cashier*. It may be here stated that while in New York the cashier has a number of assistants whose compensations in the aggregate amount to $10,000, and in Boston to $4,000, the cashier at Philadelphia had no authorized assistant.

Accompanying this statement of facts will be found the opinions of Messrs. Gilpin, Dallas, and Bayard, in support of the claim.

A proviso like the following introduced into the appropriation bill, Mr. Dallas and others think would meet the case:

"That the Secretary of the Treasury be authorized and instructed to pay to the late cashier of the Philadelphia custom-house the balance of his compensation accruing between January 1, 1845, and July 1, 1853, so as to make his yearly salary equal to that which he received from 1837 to 1845."

Very respectfully,

A. MARTIN.

JANUARY 27, 1854.

TREASURY DEPARTMENT,
Office of Commissioner of Customs, August 10, 1853.

SIR: In reference to the claim of Abraham Martin, late cashier at the custom-house in Philadelphia, for arrears of compensation from December 31, 1845, to November 1, 1846, and from June 1, 1849, to July 1, 1853, stated to be due to him from the government, amounting to the sum of $5,840 47, I respectfully submit the following statement:

It appears that Mr. Martin had been discharging the duties of cash clerk at the custom-house at Philadelphia, prior to the year 1837, at a salary of $1,000 per year; that upon application of the collector, recommending an increase of his compensation, Secretary Woodbury, by letter dated October 24, 1837, authorized an addition to his salary sufficient to make it equal to that received by persons holding similar situations in New York and Boston, provided there should prove to be surplus emoluments accruing at said office out of which to pay the proposed increase.

There were at that time no surplus emoluments received at the Philadelphia custom-house, but by the act of July 7, 1838, the Secretary of the Treasury was authorized to pay to collectors, naval officers, &c., and their respective clerks, such sums as would give said officers, respectively, the same compensation they would have been entitled to receive if the act of July 14, 1832, had not gone into effect.

Under the authority thus given by Secretary Woodbury, the act of Congress above cited, and the privilege allowed by the Secretary of the Treasury to the collector of New York to distribute the surplus emoluments among the officers of the customs, which privilege was extended by act of Congress of July 7, 1838, to officers of other ports, the collector of Philadelphia allowed to Mr. Martin a salary of $2,700 per year, which salary he continued to receive until December 31, 1845, at which date his increased compensation under the above authority terminated.

In considering Mr. Martin's right to receive the amount now claimed, to wit, the increased compensation from December, 1845, to his retirement from office, it may be proper to inquire into the le-

and *required* the Secretary of the Treasury to pay the clerks in the custom-house at Philadelphia such sums of money as, with the amount formerly appropriated, would make up *the arrears of their respective salaries* from 1832 to 1837.

These two acts of Congress seem to put it beyond doubt that the amount of compensation allowed to the cashier of the custom-house at Philadelphia in 1837 was the *true legal salary* of that officer, (as one of the clerks of the custom-house,) and it appears to me that if no alteration has been made by law he has been entitled to receive that amount ever since.

Very respectfully, yours,

JAMES BAYARD.

ABRAHAM MARTIN, Esq.

PHILADELPHIA, *September* 25, 1852.

DEAR SIR: I have considered the question submitted by you, viz: whether, under the authority of the Secretary of the Treasury, and of the acts of Congress of March 3, 1839, (9 Laws U. S., 1,011,) and 3d March, 1841, (10 Laws U. S., 123,) the cashier of the custom-house at Philadelphia is not and has not been entitled to receive the same annual compensation since 1845 which he received before that period.

I am of opinion that he is so entitled.

The facts, as I understand them, are these: Previous to the year 1837 a difference existed in the compensation of the clerks (including the cashier) at Philadelphia, and at New York, Boston, and other principal ports. In the former, after the payment of a small fixed salary, the surplus of the fees and emoluments had been paid over by the collector to the treasury of the United States; in the latter, all such surplus had, at the end of the year, been divided among those officers—a proceeding just, not only on account of the admitted inadequacy of their low fixed salaries, but because these fees and emoluments were specially collected for their remuneration. In the year 1837, this difference being called to the notice of the Secretary of the Treasury, he so far remedied it as to direct the collector to pay the salaries *for that year* at Philadelphia on the same principle as at New York. The arrears of previous years, however, which had accrued from the different modes adopted at the two ports could not be so paid, because, since the year 1832, owing to the falling off of the surplus emoluments under the compromise act, there was no fund in the collector's hand applicable by law to make up the deficiency. To remedy this injustice Congress passed the act of March 3, 1839, by which they appropriated "the sum of $15,000, or so much thereof as was necessary, to pay the clerks in the custom-house at Philadelphia the arrears of their salaries from 1832 to 1837, so as to make the same equal to what they received in the last-mentioned year, on the same principle as had been applied at New York," thus affirming the correctness of the decision of the Secretary of the Treasury in placing the salaries on the same footing at the several ports. The sum thus appropriated proved insufficient to effect the intentions of Congress, and,

on March 3, 1841, that body passed a second act, directing the Secretary of the Treasury to ascertain and pay the deficiency.

Thus the salary of the cashier at the Philadelphia custom-house was advisedly placed, by the *decision of the Treasury Department and also the two acts of Congress*, (as in every principle it should have been,) on the same footing as that of the same officer at New York. From 1841 to the close of 1845 it was so regularly paid, with the full assent of the Treasury Department. On the first of November, 1846, you were removed from office, and, when removed, your salary for the ten months of the year which had elapsed was allowed by the collector only at the rate of your nominal salary, thus bringing it back to what it was before 1837, and from which it had been changed by the deliberate action of the department and Congress. Since your restoration to the same office, that is from first of June, 1849, to the present time, the same altered rule of compensation has been adhered to.

If this change has been correct, it must be because some law has repealed or modified those to which I have referred. I have not discovered any one that can, by any construction, bear such an interpretation. The only acts of Congress which I have found referring to the compensation of the officers of the customs at Philadelphia are those of 11th February, 1846, (Pam. Laws, p. 6,) and 3d March, 1849, (Pam. Laws, 105,) and neither of these does so. The object of the former was to obviate a construction which had been placed on acts giving compensation by the year to officers of the customs, so as to provide that in cases where the officers actually served for a less period than a year a *pro rata* portion, and not the whole of their maximum annual compensation, should be paid.

Certainly this act was not intended to refer to or affect the amount of such compensation; on the contrary, by referring to "the maximum compensation of said officers," it would seem to recognize all allowances in the nature of compensation to which they had been previously entitled. The object of the latter act was to change the previously existing system of deducting the expenses of the custom-house (including of course the compensation to the officers) from the accruing revenue, and to direct the payment into the treasury of the entire gross amount, embracing even the fees and emoluments intended for the payment of such compensation; such expenses being thereafter provided for by appropriation. Neither in this act, any more than in that of 1846, was any reference, direct or implied, made to the amount of compensation of any officer.

It therefore does not seem to me to admit of a doubt that at all times since 1837 the cashier of the Philadelphia custom-house has been entitled to receive a salary calculated on the same principle as that of the same officer at New York. This was formally settled by the department in 1837; it was ratified by Congress in 1839, and again in 1841; it was carried into practice from 1837 to 1845; and its partial change since then is not called for or authorized, so far as I can discover, by any decision of the Treasury Department or any provision of law, and would, as it seems to me, be a return to that unjust dis-

crimination which it was the very object of the treasury and Congress to set aside.

Very respectfully, yours,

HENRY D. GILPIN.

A. MARTIN, Esq.

CUSTOM-HOUSE, PHILADELPHIA, *October* 12, 1837.

SIR: Permit me to submit to you the case of Mr. A. Martin, the *cashier* and *bond clerk* in this office. He applies for some extra compensation for additional and arduous duties which have devolved on him since the withdrawal of the government funds from the banks, and the collection and extension of bonds in this office, together with the disbursement of funds, and other responsible and important services rendered by him during the present year.

I should be pleased to have Mr. Martin placed in some degree in point of salary on an equality with gentlemen of the same official grade in other custom-houses, where, from the assistants provided them, their duties must be far less laborious.

I beg leave to refer you to the Solicitor of the Treasury, who has some knowledge of the services rendered by Mr. Martin, and herewith enclose the letter addressed to me by him on the subject, respectfully but earnestly recommending the application to your most favorable consideration.

I am, sir, very respectfully, your obedient servant,

J. N. BARKER, *Collector*.

Hon. LEVI WOODBURY,
Secretary of the Treasury.

TREASURY DEPARTMENT,
Comptroller's Office, March 7, 1846.

SIR: I have duly considered the enclosed abstract of payments made by Calvin Blythe, late collector of the customs at Philadelphia, to clerks in the custom-house, amounting to the aggregate sum of $41,058 90, for services rendered by them from the year 1822 to the year 1832, at *maximum* rates stipulated to be paid when the emoluments accounts of said collector showed a surplus wherewith to pay the same, and so actually allowed and paid in years prior to 1822; and which *maximum* rates do not appear to have been modified by the act of Congress approved May 7, 1822, nor by any decision of the Secretary of the Treasury, who alone could subsequently have increased or reduced them; but, on the contrary, seem to have been afterwards recognized and sanctioned by that officer, when, in the year 1839, the sum of $15,000, under the act approved March 3, 1839, and in the year 1841, the sum of $10,110, under the act approved March 3, 1841, were distributed amongst and paid to clerks in said custom-house, to complete said *maximum* rates of compensation for services performed

from the year 1832 to 1837, and which rates have since been continuously and are now allowed in conformity with law; and notwithstanding I think said collector should not have assumed to pay compensation earned so long before the beginning of his term of office, and when the propriety of paying it was under the consideration of this department, still, as I believe said compensation was earned under and claimed in conformity with a well-known and valid agreement, and that if said payments shall not be credited in the adjustment about to be made here of said collector's final account in which he has charged this sum, and suit shall be brought against him and his sureties to recover the same, that agreement would be proved to the satisfaction of the court and jury, and the sum paid there under be consequently allowed by the verdict; therefore I do hereby respectfully submit and advise that it is expedient to allow and credit said collector in the said adjustment with the sum of said payments.

With great respect, your obedient servant,

JAMES W. McCULLOH.

Hon. ROBERT J. WALKER,
Secretary of the Treasury.

[Endorsement.]

MARCH 7, 1846.

The within report approved.

R. J. WALKER,
Secretary of the Treasury.

TREASURY DEPARTMENT,
Office of Commissioner of Customs, May 28, 1853.

SIR: In reply to your inquiries in reference to the compensation of A. Martin, formerly a clerk in the custom-house at Philadelphia, I have to state that his salary in 1832 was $660; that it was subsequently increased to $1,000, and that the Secretary of the Treasury, by his letter dated April 26, 1837, authorized the collector of Philadelphia, in compliance with his recommendation, to pay to Mr. Martin, under the last proviso of the 2d section of the act of 3d March, 1837, the sum of $400 additional as his proportion of the sum of $4,457 87, the amount of surplus fees paid into the treasury by the collector in 1832. His compensation, including his proportion of the surplus of 1832, was thus fixed in 1837 at $1,400. This point is fully evidenced by the account rendered by said clerks for the arrears of their respective salaries from 1832 to 1837, so as to make the same equal to the amount received in the last-mentioned year, under the provisions of the appropriation acts of 3d March, 1839, and the 2d section of the act of 3d March, 1841, and the treasury adjustment of said accounts, certified copies of which are herewith furnished, marked Nos. 1, 2, and 3. By reference to No. 1, it will be seen that the salary of Mr. Martin, whose name appears second on the list, is stated at $660 in

1832, and $1,400 in 1837, and that the difference of $740 per annum, amounting to $3,700, was allowed and paid, as per accounts Nos. 2 and 3.

Mr. Martin was paid at the rate of $1,400 from January 1 to October 31, 1846, when he was superseded. His successor was also paid at that rate from November 1, 1846, to May 31, 1847. Mr. Martin was reappointed at the same salary on the 1st of June, 1847, and was paid at the rate of $1,400 up to the 22d of October, 1850, when it was increased by the Secretary of the Treasury to $1,600 per annum, as will be seen by a certified copy of his letter of that date, herewith furnished, marked A. Mr. Martin was paid from and after the date last mentioned and during his continuance in office at the rate thus fixed by the Secretary of the Treasury, as well as his successors, up to the 21st of August, 1855, when the Secretary of the Treasury, by his letter dated the 22d of August, 1855, a certified copy of which is also herewith furnished, marked B, approved the appointment of Caspar Shunk as cashier, and fixed his salary at $1,500 per annum, at which rate the cashier has ever since been and still continues to be paid.

Very respectfully, your obedient servant,

T. FERAN,
Acting Commissioner of Customs.

R. H. GILLET, Esq.,
Solicitor of the Court of Claims.

TREASURY DEPARTMENT,
Office of Commissioner of Customs, December 10, 1856.

SIR: In reply to your inquiries in relation to the salary of A. Martin, late cash clerk of the custom-house in Philadelphia, I have to state that it appears, from an examination of the accounts and records of the department, that Mr. Martin's salary in the year 1832 was $660, and that it was increased in 1837 to..... $1,000 00

And that he was allowed in addition thereto, under the last proviso of the 2d section of the general appropriation act of the 3d March, 1837, this sum, as his proportion of $4,457 87, the amount of surplus fees paid into the treasury in the year 1832 by the collector of Philadelphia..... 400 00

Which made his salary in 1837, including the surplus of 1832..... 1,400 00

This latter sum was the salary recommended by the collector at Philadelphia in his letter to the Secretary of the Treasury dated February 4, 1837, and in compliance with which the Secretary authorized the distribution by his letter of the 26th April, 1837, a certified copy of which is herewith transmitted.

I also transmit to you herewith a certified copy of the list rendered by the collector of Philadelphia, under the requirements of the 13th

section of the act of 7th May, 1822, (3 Stat at Large, p. 695,) of the clerks, &c., employed by him in January, 1843, in which Mr. Martin's salary is stated at $1,400 a year, at which rate he was paid for the year 1846, and at which rate the cash clerk of the custom-house is now and has been paid from that time to the present.

I have not been able to find any authority for the payment of a greater salary to Martin than that above mentioned; but if there was authority prior to 1842 to pay him at a higher rate, that, in my judgment, would not preclude the Secretary from exercising the authority conferred on him by the 15th section of the act of 7th May, 1822, to limit and fix the compensation of the clerks, &c., and which it appears he did exercise in regard to the clerks in Philadelphia in 1842.

Very respectfully, your obedient servant,

H. J. ANDERSON,
Commissioner of Customs.

DANIEL RATCLIFFE, Esq,
Assistant Solicitor Court of Claims.

TREASURY DEPARTMENT,
Office of Commissioner of Customs, March 26, 1858.

SIR: I have the honor to acknowledge the receipt of your letter of yesterday's date, in which you inquire "what was the mode of payment of custom-house officers at New York at the time referred to in Mr. Martin's petition? (from 1845 to 1853.) Was it by salary and the distribution of certain surplus fees? And whether there was any surplus fees at Philadelphia at the period for which Mr. Martin claims?"

In reply, I would state that the clerks at New York and Philadelphia, at the time referred to, received certain specified salaries, as regulated and fixed, from time to time, by the Secretary of the Treasury, under the 15th section of the act of 7th of May, 1822. These salaries—the fees and emoluments of the collector being insufficient to pay the full amount—were paid in part from fees, and the deficiency out of the accruing revenue, from the passage of the act of 3d of March, 1841, to that of the 3d of March, 1849, since which time the deficiency has been paid out of the appropriation for "expenses of collecting the revenue," provided by the last-mentioned act, on estimates made by the collectors.

Prior to the year 1832 the fees and emoluments of the collectors were sufficient to pay their compensation, clerk hire, and all other expenses, and leave frequently a surplus for the treasury.

There were no surplus fees at Philadelphia, or either of the principal ports, after the year 1832, the tariff acts of the 14th of July 1832, and 2d of March, 1833, having reduced the fees and emoluments of the collectors below the amount required to pay their compensation and expenses, and consequently the deficiency was paid annually, from 1833 to 1841, out of the appropriations provided by the 3d section of the act of 3d of March, 1833, and kindred provisions made from year to year to 1838, similar to that of July 7 of the latter

year. Since 1841 the deficiency has been paid in the mode above indicated.

It may not be improper to add, by way of explanation of the different modes pursued since 1841, that the 5th section of the act of March 3, 1841, makes an entirely different provision for compensation and the mode of paying these officers from that pursued under the act of 1822. The compensation of the collectors of New York and Philadelphia was limited by the 9th section of the act of 7th of May, 1822, to $4,000 per annum, and the deficiency since 1832 was provided for by appropriations, as above stated, subject, however, to the *proviso* in the act of 7th of July, 1838, that no officer should receive, under said act, a greater amount than was received in 1832. By the 5th section of the act of 3d of March, 1841, the compensation of these collectors was increased to $6,000 a year, and by the construction of that law by the department they were allowed to *retain* the fees and emoluments as they accrued till they received the maximum, and leave the deficiency for clerk hire and other expenses, to be paid out of the accruing revenue, &c., as above stated.

The salary designated by the collector of Philadelphia for Mr. Martin, and approved by the Secretary of the Treasury in 1845, was at the rate of $1,400 a year, at which rate he was regularly paid in the modes described during his continuance in office; and the vote thus fixed at that time has ever since been and still continues to be paid to those who have succeeded him.

Very respectfully, your obedient servant,

SAM'L INGHAM,
Commissioner of Customs.

D. RATCLIFFE, Esq.,
Assistant Solicitor Court of Claims.

TREASURY DEPARTMENT, *July* 14, 1854.

SIR: I had the honor to receive your letter of the —— instant, enclosing the memorial of Abraham Martin, late cash clerk in the custom-house at Philadelphia, praying to be allowed the difference of compensation between $1,600 and $2,700 for the period stated.

The claim of Mr. Martin was presented to me in July, 1853, and was referred to the Commissioner of Customs for a report of the facts therein. A copy of his report, and of my letter to Mr. Martin advising him of my decision thereon, are herewith enclosed.

My opinion remains unchanged, and that Mr. Martin received much more under the order of Mr. Woodbury than was intended by it.

I am, very respectfully,

P. G. WASHINGTON,
For the Secretary of the Treasury.

HON. T. J. D FULLER,
Chairman Committee on Commerce, House of Representatives.

B.

The United States to A. Martin, Dr.

To my services as cashier of the Philadelphia custom-house, from 1st June, 1849, to 1st July, 1853, four years and one month, at the rate of $2,700 per annum, being the rate allowed to the cashier by authority of the Secretary of the Treasury and acts of Congress.....	$11,022	52
This amount short paid from 1st January to 1st November, 1846, having been paid at the rate of $1,400, instead of $2,700 per annum.....	1,083	33
	12,105	85
Deduct amount received from 1st June, 1849, to 1st July, 1853, as will appear by reference to the account of emoluments of collector of Philadelphia	6,265	38
	5,840	47

ABRAHAM MARTIN *vs.* UNITED STATES.

1. This claim is founded on an authority of Secretary Woodbury, given to the collector of Philadelphia on the 24th of October, 1838, to raise the salary of the *cash clerk* so as to make it equal to what was paid to the *cash* clerks at *New York and Boston, performing similar duties.*

2. Upon the acts of Congress passed 3d March, 1837; 3d March, 1839; and 3d March, 1841.—(See 5th volume Statutes at Large, page 175, section 2; page 347; and page 432, section 4.)

1. Now, we deny that the letter of Woodbury gave the collector at Philadelphia the power to raise the salary of the petitioner to $2,700. (See the application of the collector, &c., and the authority which followed.)

2. We also deny that there is anything in the acts of Congress referred to giving such authority. Let us examine them.—(See the acts of 1837, 1839, and 1841; also the act of 7th July, 1838; 5 Statutes at Large, page 264, section 3.)

For facts read communication of Commissioner of Customs.

1. Salary of petitioner.
2. Nature of the application to Mr. Woodbury.
3. Compensation of similar clerks at Boston, Baltimore, &c.
4. The relative amount of business at the different ports.

(See the act of 1822; 3 Statutes at Large, page 695, section 15.)

Claims from 1st January, 1846, to 1st November; from 1st June, 1847, to 1st July, 1853; $2,700 *per annum.*

Regular salary, $1,000. The surplus fees of 1832 made salary in 1837 $1,400.

Application of the collector was made to the Secretary in 1837. Reply of Secretary, and the acts of Congress which followed. *The effect of this act.*

TREASURY DEPARTMENT, *May* 28, 1858.

Pursuant to the act of Congress of February 22, 1849, I hereby certify that the annexed are true copies of original papers numbered 1, 2, 3, and letters A and B, taken from the records of this department.

In witness whereof, I have hereunto set my hand and caused the [L. S.] seal of the Treasury Department to be affixed on the day and year first above written.

HOWELL COBB,
Secretary of the Treasury.

No. 1.

The United States to the undersigned, debtor, for amount due them, which, with the amount appropriated by the general appropriation act of March 3, 1839, *will make up the arrears of their respective salaries as clerks in the custom-house at Philadelphia from* 1832 *to* 1837, *as authorized by the section of the general appropriation act of March* 3, 1841.

To whom due.	Salary per annum from 1832 to 1837.	Salary in 1837.	Difference per annum.	Amount due from 1832 to 1837, as appears per Auditor's statement, No. 1066.	Amount received under appropriation act of 1839, per Auditor's statement, No. 1066.	Amount due and payable under appropriation act of 1841.
Charles Treichel	$840 00	$1,400 00	$560 00	$2,800 00	$1,672 84	$1,127 16
Abraham Martin	660 00	1,400 00	740 00	3,700 00	2,210 27	1,489 73
Thos. F. Vallette	1,020 00	1,400 00	380 00	1,900 00	1,135 00	765 00
Thos. Ashmead	720 00	1,200 00	480 00	2,400 00	1,433 69	966 31
John C. Pechin	660 00	1,200 00	540 00	2,700 00	1,612 90	1,087 10
Robert Steele	720 00	1,200 00	480 00	2,400 00	1,433 69	966 31
F. C. Trembling	650 00	850 00	200 00	1,000 00	597 37	402 63
John McAdam	600 00	850 00	250 00	1,250 00	746 72	503 28
Thomas Latimer	660 00	900 00	240 00	1,200 00	716 94	483 16
S. U. Hopkins	600 00	800 00	200 00	1,000 00	597 37	402 63
R. G. Statesbury	600 00	800 00	200 00	*760 00	454 00	306 00
Edmund Barter	.....	.....	.....	†240 00	143 38	96 62
David Gibson	720 00	1,200 00	480 00	‡190 00	71 69	48 31
Joseph Dunn	.....	.....	.....	§1,202 00	727 99	493 01
J. Bartram North	.....	.....	.....	‖1,058 00	632 01	425 99
Joseph B. Howell	650 00	850 00	200 00	1,000 00	597 37	402 63
Richard L. Howell	1,320 00	1,500 00	180 00	¶360 00	215 87	144 13

* January 1, 1832, to October 18, 1835.
† October 19, 1835, to December 31, 1836.
‡ January 1, to March 31, 1838.
§ April 1, 1838, to October 17, 1834.
‖ October 18, 1834, to December 31, 1837.
¶ For 1832 and 1833.

No. 1066.] TREASURY DEPARTMENT,
First Auditor's Office, March 30, 1839.

I hereby certify that I have examined and adjusted an account between the United States and the undermentioned clerks in the Philadelphia custom-house, and find that the sum of fifteen thousand dollars is due from the United States and payable to John C. Pechin, their assignee, being so much appropriated under the 2d section of the act making appropriations for the civil and diplomatic expenses of the government, "approved March 3, 1839," for paying the clerks in the custom-house at Philadelphia the arrears of their salaries from 1832 to 1837, so as to make the same equal to what they received in the last-mentioned year, viz:

To Charles Treichel	$1,672 64
Abraham Martin	2,210 27
Thomas F. Valette	1,135 00
Thomas Ashmead	1,433 69
John C. Pechin	1,612 90
Robert Steele	1,433 69
T. C. Deimling	597 37
John McAdam	746 72
Thomas Latimer	716 84
S. W. Hopkins	597 37
R. G. Statesbury	454 00
Edmund Barter	143 38
David Gibson	71 69
J. Bartram North	632 01
Joseph Dunn	729 99
Joseph B. Howell	597 37
Richard L. Howell	215 07
	15,000 00

As appears from the statement and vouchers herewith transmitted for the decision of the Comptroller of the Treasury thereon.

J. MILLER,
First Auditor.

JAMES A. BARKER, Esq.,
Comptroller of the Treasury.

COMPTROLLER'S OFFICE.

I admit and certify the above balance this 30th day of March, 1839.

J. N. BARKER,
Comptroller.

THOMAS L. SMITH, Esq.,
Register.

No. 2567.] TREASURY DEPARTMENT,
First Auditor's Office, March 6, 1841.

I hereby certify that I have examined and adjusted an account between the United States and the undernamed clerks in the Philadelphia custom-house, and find that the sum of ten thousand one hundred and ten dollars is due from the United States and payable to John C. Pechin, their attorney, being so much appropriated by the act making appropriations for the civil and diplomatic expenses of the government, "approved March 3, 1841," as with that appropriated by the act of March 3, 1839, will make up the arrears of their salaries from 1832 to 1837.

Due to Charles Treichel	$1,127 36
Abraham Martin	1,489 73
Thomas F. Valette	765 00
Thomas Ashmead	966 31
John C. Pechin	1,087 00
Robert Steele	966 31
F. C. Deimling	402 63
John McAdam	503 28
Thomas Latimer	483 16
S. W. Hopkins	402 63
R. G. Statesbury	306 00
Edmund Barter	96 62
David Gibson	48 31
J. Bartram North	425 99
Joseph Dunn	492 01
Joseph B. Howell	402 63
Richard L. Howell	144 93
	10,110 00

As appears from the statement and vouchers herewith transmitted for the decision of the Comptroller of the Treasury thereon.

J. MILLER,
First Auditor.

JAMES N. BARKER, Esq.,
Comptroller of the Treasury.

COMPTROLLER'S OFFICE.

I admit and certify the above balance this 6th day of March, 1841.

J. N. BARKER,
Comptroller.

THOMAS L. SMITH, Esq.,
Register.

A.

TREASURY DEPARTMENT, *October* 22, 1850.

SIR: I have received your letter of the 16th inst. respecting the clerical force of the custom-house under your charge. The department is constrained, by the limited appropriations for the collection of the revenue, to keep the expenditures at the lowest possible point that the interests of the service will allow.

In the examination of the application of Dr. Treichel, principal clerk and auditor, it appears that the salary he now enjoys is the same in amount as that drawn by the like officer in Boston for similar services. His salary was fixed by my predecessor, and the department does not feel itself authorized to increase it.

In view of the increased business at your port, and for the reasons stated by you, the salary of the cashier (Martin) is fixed at $1,600; the first deputy, (Bell,) at $1,500; marine hospital clerk, (Bonsall,) at $1,000; the recording clerk, (Fisher,) at $760 per annum; making an aggregate increase of the expenses of your office of $860, which it is presumed the additional fees under the act of the 29th of July last will more than cover.

It is understood that the present force must suffice for any duties devolved upon your office by virtue of the act above mentioned.

I am, respectfully, your obedient servant,

T. CORWIN,
Secretary of the Treasury.

WM. D. LEWIS, Esq.,
Collector, &c., Philadelphia, Pa.

B.

TREASURY DEPARTMENT, *August* 22, 1855.

SIR: The nominations submitted in your letter of yesterday are approved, viz:

Rowland Parry, as deputy collector, *vice* Charles Treichel, deceased.

Casper Shunk, as cashier, at $1,500, instead of $1,600 per annum, *vice* Rowland Parry, promoted.

John Goodyear, as assistant cashier, at $1,200, instead of $1,300 per annum, *vice* Casper Shunk, promoted.

William B. Jones, liquidating clerk, salary increased from $1,200 to $1,400 per annum.

L. K. Bell, chief entry clerk, salary increased from $1,200 to $1,400 per annum.

R. S. H. George, entry clerk, salary increased from $1,000 to $1,100 per annum.

Very respectfully, your obedient servant,

JAMES GUTHRIE,
Secretary of the Treasury.

CHARLES BROWN, Esq.,
Collector, Philadelphia, Pa.

C.

TREASURY DEPARTMENT, *December* 16, 1856.

Pursuant to the act of Congress of February 22, 1849, I hereby certify that the annexed copy of a letter of the Secretary of the Treasury, dated the 24th of October, 1837, addressed to James N. Barker, esq., collector of the customs, Philadelphia, is a true copy, taken from the records of this department.

In witness whereof, I have hereunto set my hand and caused the [L. S.] seal of the Treasury Department to be affixed, on the day and year first above written.

JAMES GUTHRIE,
Secretary of the Treasury.

TREASURY DEPARTMENT, *October* 24, 1837.

SIR: In reply to your letter of the 16th instant, recommending an increase of the compensation of Mr. A. Martin, cashier and bond clerk in your office, so as to make his salary equal in amount to what is received by persons holding similar situations at New York and Boston, I have to remark that whilst the department has the disposition to place him on a footing with others discharging similar duties elsewhere, it has to regret the want of power to do so, there being no fund at its disposal applicable to this object. Should there prove to be any surplus emoluments in your office at the close of the year the proposed increase may be made therefrom.

I am, very respectfully, your obedient servant,

LEVI WOODBURY,
Secretary of the Treasury.

JAMES N. BARKER, Esq.,
Collector of the Customs, Philadelphia.

TREASURY DEPARTMENT, *December* 10, 1856.

Pursuant to the act of Congress of 22d February, 1849, I hereby certify that the annexed are true copies from the records and files of this department.

In witness whereof, I have hereunto set my hand, and caused the [L. S.] seal of the Treasury Department to be affixed, on the day and year first above written.

JAMES GUTHRIE,
Secretary of the Treasury.

TREASURY DEPARTMENT, *April* 26, 1837.

SIR: In the last proviso of the second section of the general appropriation act of the 3d of March last, this department is authorized "to extend to the collectors at such other ports where a surplus of emoluments have been accounted for and paid into the treasury in the year 1832 the privilege granted to the collector of New York, to take effect from the first day of January last." The privilege alluded to in the law is understood to refer to a distribution of the surplus of the emoluments of the year 1832 amongst the clerks at New York. It appears by the public records that the surplus of emoluments which accrued at your port in the year 1832, and paid into the treasury, amounted to the sum of $4,457 82; and it being considered the intention of the law above quoted that an amount equal to this sum should be distributed amongst the clerks of the custom-house at your port, you are therefore authorized to pay them at the close of each quarter of the current year a proportionate part of their distributive shares, according to the rates proposed in your letter, under date of the 4th of January last. As the amount thus distributed is to be paid out of money in the treasury, the sum advanced out of the revenue under this arrangement will be refunded at the close of the year upon your rendering a separate account for this disbursement at that time.

It will be proper, therefore, that you take receipts for these payments, and also an order from the clerks authorizing you to receive for them from the treasury their respective distributive shares, to enable the accounting officers to make the necessary settlements when your account is rendered at the expiration of the year.

I am, &c., &c.,

LEVI WOODBURY,
Secretary of the Treasury.

JAMES N. BARKER, Esq.,
Collector at Philadelphia.

List of officers, clerks, messengers, watchmen, laborers, &c., employed in the district of Philadelphia, January, 1843.

Name of incumbent.	Office.	Rate of compensation.	Date of appointment.
		Per annum.	
Thomas S Smith	Collector	$4,400 00	Sept. 12, 1842.
Charles Treichel	Deputy collector	1,500 00	April 1, 1823.
Richard L. Howell	----do	1,500 00	April 18, 1822.
Thomas Ashmead	Clerk	1,200 00	March 29, 1825.
Leonard K. Bell	----do	1,000 00	Sept. 15, 1836.
John S. Cummings	----do	900 00	Sept. 22, 1836.
Elisha W. Cook	----do	850 00	May 1, 1841.
Samuel Eckel	----do	850 00	Feb'ry 7, 1839.
Joseph B. Howell	----do	850 00	Nov. 8, 1831.
William H. Hood	----do	800 00	Oct. 16, 1842.
Charles P. Hayes	----do	660 00	Nov. 16, 1842.

LIST—Continued.

Name of incumbent.	Office.	Rate of compensation.	Date of appointment.
		Per annum.	
Thomas Latimer	Clerk	$900 00	March 28, 1825.
Abraham Martin	....do	1,400 00	Feb. 17, 1819.
John McAdam	....do	1,200 00	Dec. 1, 1832.
John C. Pechin	....do	1,200 00	Sept. 1, 1820.
Edward W. Roberts	....do	1,100 00	May 3, 1841.
Robert Steele	....do	1,200 00	Jan. 1, 1816.
Charles W. Smith	....do	900 00	Oct. 15, 1842.
Thomas F. Vallette	....do	1,400 00	Jan. 1, 1816.
George Lowry	Mes'ger collector's office.	511 00	May 1, 1841.
John L. Freidlein	....do	420 00	Oct. 22, 1842.
Jose B Sutherland	Naval officer	3,000 00	Nov. 17, 1842.
John D. George	Deputy naval officer	1,500 00	Dec. 15, 1815.
Charles Ferguson	Clerk to naval officer	720 00	Oct. 1, 1841.
Robert Heysham	....do	1,000 00	Nov. 19, 1822.
Henry Hay	....do	720 00	Nov. 29, 1842.
John G. Watmough	Surveyor	2,500 00	Oct. 16, 1841.
James Hay, jr	Deputy surveyor	1,500 00	May 1, 1841.
Edward Watmough	Clerk surveyor's office	500 00	Nov. 1, 1841.
William A. Shary	Messenger	547 50	June 1, 1841.
C. F. Breiull	Appraiser	1,500 00	Sept. 2, 1842.
Samuel Spackman	....do	1,500 00	May 1, 1841.
W. Chaloner	Assistant appraiser	1,200 00	May 1, 1841.
W. B. Whitecar	....do	1,200 00	May 1, 1841.
G. F. Beyer	Clerk to appraiser	800 00	Nov. 9, 1841.
Henry Cooper	Laborer to appraiser	469 00	May 1, 1841.
James Tooney	....do	469 00	May 1, 1841.
Charles Zell	....do	469 00	May 1, 1841.
Francis J. Grund	Weigher	Fees.	Oct. 25, 1842.
Thomas Graham, jr	First deputy weigher	1,095 00	Nov. 21, 1842.
Francis Shulze	Second deputy weigher	1,000 00	August 1, 1841.
J. H. Patterson	Third deputy weigher	1,000 00	Sept. 13, 1842.
B. F. Crespin	Fourth deputy weigher	600 00	Dec. 28, 1842.
Thomas H. Buckman	Laborer to weigher	360 00	Nov. 21, 1842.
William Frompbaach	....do	360 00	Jan. 12, 1843.
Philip Hoffman	....do	360 00	Nov. 8, 1842.
Johnston Kelly	....do	360 00	Dec. 8, 1842.
Marcus McCloskey	....do	360 00	Nov. 1, 1842.
John Scanlaus	....do	360 00	March 10, 1838.
William Glading	Gauger	Fees	May 1, 1841.
Washington Heimburger	....do	Fees.	May 1, 1841.
Michael Andross	Measurer salt, &c	Fees.	Sept. 13, 1842.
Joseph Bulsford	....do	Fees.	Sept. 13, 1842.
William Metcalf	....do	Fees.	Sept. 13, 1842.
J. H. Sherburne	....do	Fees.	Oct. 18, 1842.
Benjamin R. Mears	Marker	Fees.	Oct. 21, 1842.
Edward T. Shaw	....do	Fees.	July 20, 1841.
Isaac Hickman	Laborer to markers	1 50 p. day.	Feb. 1, 1842.
James Hand	Master revenue barge	1,095 00	Sept. 13, 1842.
A. Albretson	Boatman revenue barge	420 00	May 10, 1842.
J. B. Cooper	....do	420 00	Oct. 20, 1842.
William Green	....do	420 00	Oct. 20, 1842.
W. R. Williams	....do	420 00	May 3, 1842.
Samuel H. Tyson	Storekeeper, C. H	1,095 00	May 1, 1841.
Thomas Foster	Asst. storekeeper, C. H.	840 00	Oct. 18, 1842.
Samuel Anderson, (Lazaretto)	Inspector	1,095 00	May 1, 1842.
George Bressler	....do	1,095 00	May 1, 1842.
Richard Christie	....do	1,095 00	Oct. 19, 1841.

LIST—Continued.

Name of incumbent.	Office.	Rate of compensation.	Date of appointment.
		Per annum.	
Daniel Clark	Inspector	$1,095 00	June 7, 1841.
Peter B. Curry	....do	1,095 00	May 1, 1841.
George Clymer	....do	1,095 00	Oct. 1, 1828.
T. W. Custis	....do	1,095 00	June 16, 1842.
John C. Doyle	....do	1,095 00	Oct. 19, 1842.
Thomas D. Dougherty	....do	1,095 00	Nov. 1, 1842.
Oliver Evans	....do	1,095 00	May 1, 1841.
Robert S. English	....do	1,095 00	Oct. 18, 1842.
Samuel Edwards	....do	1,095 00	Jan. 20, 1832.
Crawford Foster	....do	1,095 00	May 1, 1841.
Robert Ford	....do	1,095 00	Oct. 30, 1842.
John K. Graham	....do	1,095 00	Sept. 13, 1842.
Bartholomew Graves	....do	1,095 00	Nov. 17, 1842.
George W. Guthrie	....do	1,095 00	Nov. 16, 1842.
Robert Howell	....do	1,095 00	May 1, 1841.
Jacob F. Hackalen	....do	1,095 00	Oct. 18, 1842.
James Hoy	....do	1,095 00	Oct. 18, 1842.
William C. Hancock	....do	1,095 00	Nov. 1, 1842.
Sandy Harris	....do	1,095 00	Nov. 16, 1842.
Abraham Kintzing	...do	1,095 00	May 1, 1841.
Daniel M. Keim	....do	1,095 00	Nov. 16, 1842.
E. P. Lescure	....do	1,095 00	Nov. 1, 1842.
Abraham Myers	....do	1,095 00	Sept. 13, 1842.
Bernard McGuire	....do	1,095 00	Sept. 13, 1842.
Gideon F. Moore	....do	1,095 00	Nov. 16, 1842.
John Phillips, (Bristol)	....do	1,095 00	May 1, 1841.
Symington Philips	....do	1,095 00	Oct. 30, 1842.
Charles M. Prevost	....do	1,095 00	May 1, 1841.
John Rakestraw	....do	1.095 00	Sept. 13, 1842.
Tomas B. Russum	....do	1,095 00	Sept. 13, 1842.
A. Redheffer	....do	1,095 00	Oct. 18, 1842.
Thomas Stewart	....do	1,095 00	July 4, 1842.
Henry Schell, jr	....do	1,095 00	May 1, 1841.
Joseph P. Smith	....do	1,095 00	Oct. 18, 1842.
Miles Tully	....do	1,095 00	Nov. 1, 1842.
James S. Wharton	....do	1,095 00	Oct. 19, 1842.
Jesse Waler, (Richmond)	....do	1,095 00	Nov. 16, 1842.
George Wevill	....do	1,095 00	Oct. 18, 1842.
Y S. Walter, (Marcus Hook)	....do	1,095 00	May 1, 1841.
Francis McAvoy	Principal night inspector	800 00	Oct. 18, 1842.
Patrick Maguire	....do	800 00	Oct. 18, 1842.
Jacob Albright	Night inspector	456 25	Oct. 18, 1842.
George Alexander	....do	456 25	Oct. 20, 1842.
Charles Brewster	....do	456 25	May 1, 1841.
Joseph Brown	....do	456 25	Oct. 19, 1842.
John Cox	....do	456 25	May 1, 1841.
Henry Dick	....do	456 25	Oct. 18, 1842.
George Ellis	....do	456 25	Nov. 5, 1842.
Moses Finley	....do	456 25	Oct. 18, 1842.
Joseph Gardy	....do	456 25	Oct. 18, 1842.
John M. Graffe	....do	456 25	May 1, 1841.
Adam D Hamerick	....do	456 25	Nov. 5, 1842.
John F. Keyer	....do	456 25	Oct 18, 1842.
Joseph Little	....do	456 25	Oct. 31, 1842.
James Lamb	....do	456 25	Oct. 18, 1842.
Henry McGathen	....do	456 25	Oct. 31, 1842.
John Mansure	....do	456 25	Nov. 14, 1842.

LIST—Continued.

Name of incumbent.	Office.	Rate of compensation.	Date of appointment.
		Per annum.	
David Pinkerton	Night inspector	$456 25	Nov. 15, 1842.
T. J. L. Smiley	....do	456 25	Nov. 15, 1842.
Timothy Symmes	....do	456 25	Nov. 9, 1842.
Philip Tears	....do	456 25	May 4, 1842.
John S. Turner	....do	456 25	Oct. 29, 1842.
Silas Wilson	....do	456 25	Nov. 21, 1842.
Nathaniel Gates	Sampler	547 50	Oct. 31, 1842.
Robert M. Affee	Day watchman	456 25	June 1, 1841.

NOTES.—The "dates of appointment" in the foregoing list of deputies and clerks are the dates of their *original* appointments as *clerks*, without reference to their reappointments from time to time; and the rates of compensation affixed to their respective names are to be understood as their *present* rates, without reference to the changes which have been made in that respect since the dates of their original appointments.

All the individuals whose names are included in the foregoing list are residents of Philadelphia or its immediate vicinity, excepting five of the inspectors, stationed at Richmond, Bristol, Chester, Lazaretto, and Marcus Hook, and so designated in the list.

The above salaries of the clerks differ from those reported by the collector July 10, 1841, to Hon. Mr. Gilmer, (see House Report No 741, 27th Cong., 2d sess., page 222,) having then reported merely *the old stated salaries*, without the addition authorized by the act of March 3, 1837, (civil appropriation act, second section,) being the surplus fees paid into the treasury in 1832 by collector of Philadelphia, amounting to $4,457 87, and which was authorized by the Secretary to be paid to the clerks after the expiration of each year. This addition is now considered, under said act, to be a part of their permanent compensation, and so returned.

THOMAS S. SMITH, *Collector*.

COLLECTOR'S OFFICE, *District of Philadelphia, February* 4, 1843.

ABRAHAM MARTIN *vs.* THE UNITED STATES.

5 Stat., 347, act of 1839: "For paying the clerks in the custom-house at Philadelphia the arrears of their salaries from 1832 to 1837, so as to make the same equal to what they received in the last-mentioned year, on the same principle as had been applied at New York, $15,000, or so much thereof as may be necessary."

1. Martin was a clerk in the custom-house.

2. He was to receive the "arrears" of his "salary" from 1832 to 1837.

3. His salary was to be made equal to what it was in 1837.

4. He received in 1837 $2,700, and the same in 1838.

5 Stat., 432, 1841, 2d sess. 26th Cong., chap. 35, sec. 4: "That the Secretary of the Treasury be, and he is hereby, authorized and required to pay to the clerks in the custom-house in Philadelphia such sum of money as, with the amount appropriated by the general appropriation act of the 3d March, 1839, will make up the arrears of their respective salaries from 1832 to 1837, the sum to be so paid to be first ascertained by the proper accounting officers of the treasury."

The previous act of 1839 not having appropriated enough to pay

the salaries of the clerks according to the rates fixed by that act, which was the salary paid in 1837, which for the cashier amounted to $2,700, a further appropriation was made to make up "*the arrears of their respective salaries from* 1832 *to* 1837."

1. By the adopting as the rule for the salaries of those officers the amount paid in 1837 it just as definitely presented the salary of each officer as though each officer was mentioned by name, and the amount fixed to each.

2. The Treasury Department so understood these acts of Congress, and obeyed them accordingly, and paid the full salary of $2,700 from 1832 to 1845.

III. The First Comptroller of the Treasury on the 7th March, 1846, makes a report on this subject to the Secretary of the Treasury. He says: "As I believe said compensation was caused under and claimed in conformity with a well-known and valid agreement, and that if said payment shall not be credited in the adjustment about to be made him of said collector's final account, in which he has charged this sum, and suit shall be brought against him and his sureties to recover the same, that agreement would be proved to the satisfaction of the court and jury, and the sum paid thereunder be consequently allowed by the verdict; therefore, I do hereby respectfully submit and advise that it is expedient to allow and credit said collector in the said adjustment with the sum of said payments."

[Endorsement]

"The within report approved.

"R. J. WALKER,

"*Secretary of the Treasury.*

"MARCH 7, 1846."

Commissioner of Customs Anderson's report of August 10, 1853.

1. He says: "The collector of Philadelphia *allowed* Mr. Martin a salary of $2,700."

The fact is, that the additional salary was authorized by the Secretary, charged in the accounts at the end of the year, and *allowed by the accounting officers*, and paid by a draft on New York after the accounts were audited.

2. There was no evasion by Mr. Martin. He received to within ten months of the time when he was removed from office the salary of $2,700. The charge was made at the *end of the year* in the accounts, and not paid until the accounts were audited at Washington.

3. His construction of the statutes is erroneous.

IN THE COURT OF CLAIMS.

ABRAHAM MARTIN *vs.* THE UNITED STATES.

Brief on final rehearing for the defendants.

The petition states that the claimant, within certain specified periods, was cash clerk in the custom-house, and that, for certain portions of the time, he was not paid the full compensation required by law.

Material facts as understood by the Solicitor.

1. That the claimant was a clerk, called cashier, in the custom-house at Philadelphia during the period stated in his petition.

2. That he received the compensation, as such clerk, as stated in his petition.

3. That his compensation, except under a special temporary legislation by Congress, was fixed by the Secretary of the Treasury.

4. That the Secretary acted under the act of Congress of the 3d of March, 1837, and that he caused the full amount of the surplus fees and emoluments which had been paid into the treasury to be distributed in conformity thereto.

5. That the distribution at New York had been of the surplus fees only.

6. That the claimant's compensation at or prior to January, 1843, was fixed at $1,400, and so remained until subsequently altered.—(See collector's return.)

7. That on the 22d day of October, 1850, claimant's salary was raised by Mr. Corwin to $1,600, and so remained until his employment ceased.—(See Corwin's letter.)

8. That Mr. Woodbury's letter of April 26, 1837, related solely to the year 1837, and did not make a permanent change in claimant's compensation. That of October 24, 1837, was confined exclusively to the surplus of that year.

9. As far as he received amounts beyond the authority of that letter and the statutes recited below, he was overpaid.

Laws which bear upon the question in this case.

The act of May 7, 1822, (1 U. S. L., 695, § 19,) limits the compensation of the collector at Philadelphia derived from emoluments; "after deducting the necessary expenses incident to his office in the same year, the excess shall, in every such case, be paid into the treasury for the use of the United States."

Section 12 provides for rendering an emolument account and the mode of settlement.

Section 13 provides for rendering a list of clerks and the amount of compensation.

Section 15 provides "that the Secretary of the Treasury may, from

time to time, limit and fix the number and compensation of clerks to be employed by any collector," &c.

This act remains in force, except the limitation of compensation is enlarged by the act of the 3d of March, 1841, (5 U. S. L., 432, § 5.)

The act of March 3, 1837, making appropriations for the expenses of government for the year 1837, (5 U. S. L , 163, 175, § 2,) provides:

"That the Secretary of the Treasury be and he is hereby authorized to pay to the collectors * * and their respective clerks, * * * out of any money in the treasury not otherwise appropriated, such sums as will give the said officers, respectively, the same compensation in the year 1837, according to the importations of that year, as they would have been entitled to receive if the act of the 14th of July, 1832, had not gone into effect: *Provided*, That no officer shall receive under this act a greater annual salary or compensation than was paid to such officer for the year 1832; and in no case shall the compensation of any other officers than collectors, naval officers, surveyors, and clerks, whether by salaries, fees, or otherwise, exceed the sum of $1,500 per annum, nor shall the union of any two or more of those offices in one person entitle him to receive more than that sum per annum."

Provision is then made for rendering accounts, &c., and then follows this provision:

"*Provided, however*, That the Secretary of the Treasury be authorized to extend to the collectors of such other ports, where a surplus of emoluments have been accounted for and paid into the treasury in the year 1832, the privilege granted to the collector of New York, to take effect from the first day of January last."

The act of July 7, 1838, to provide for the support of the military academy for 1838, (5 U. S. L., 264, 265, § 3,) reënacts the above provision of the act of 1837, with unimportant additions.

The act of March 3, 1839, making appropriations for the civil and diplomatic expenses for 1839, (5 U. S. L., 347,) contains the following:

"For paying the clerks in the custom-house in Philadelphia the arrears of their salaries from 1832 to 1837, so as to make the same equal to what they received in the last-mentioned year, on the same principle as has been applied in New York, fifteen thousand dollars, or so much thereof as may be necessary."

No legislation is found upon this subject for the year 1840.

The act of the 3d of March, 1841, making appropriations for civil and diplomatic expenses for the year 1841, (5 U. S. L., 431, § 2,) provides:

"That the Secretary of the Treasury be, and he is hereby, authorized to pay out of any money in the treasury not otherwise appropriated, to the collectors * * their clerks * * * the same compensation for the year 1839 which they would have been entitled to receive if the third section of the act of July, 1838, entitled An act to provide for the support of the military academy, * * had continued in force during the said year and subject to the provisions and restrictions therein contained."

Section 4 provides: "That the Secretary of the Treasury be, and is hereby, authorized and required to pay to the clerks in the custom-house in Philadelphia such sum of money as, with the amount appro-

priated by the general appropriation act of the 3d of March, 1839, will make up the arrears of their respective salaries from 1832 to 1837, the sum to be so paid to be first ascertained by the proper accounting officers of the treasury."

This is the last provision found upon this subject applicable to Philadelphia.

The above provisions making appropriations have, it is understood, all been fully executed by the Treasury Department, and the power of regulating the compensation of clerks rests where it did under the act of 1822, and is controlled by the collectors, with the approbation of the Secretary of the Treasury, and the amount is payable out of fees and emoluments which the collector is authorized to receive under the collection act of 1799 and the act of 1841, above referred to.

10. The cashier's salary was fixed by Mr. Guthrie, August 27, 1855, at $1,500, instead of $1,600.—(See Guthrie's letter.)

It is shown to have been $1,400 prior to Mr. Corwin's fixing it at $1,600.—(See the collector's return in 1843; see also the Auditor's statement.)

This case really involves no question of law, but depends upon facts.

A. The statutes referred to have all been executed, so that they are not the subject of construction.

B. The letters of Mr. Woodbury do not fix the rate of compensation at all, but confers authority upon the collector to distribute, in 1837, the surplus which accrued and was paid into the treasury in 1832.

C. The Secretary of the Treasury had no power to fix the salary of the collector's clerks, except by way of limiting the sum proposed to be paid by the collector, except as to the surplus, and then only by special law. If he could dictate a larger sum than the collector should name, he might cut off his means of paying others, and, in fact, deprive him of his own compensation, by exhausting upon a few the whole of the collector's emoluments.

The power of limitation conferred upon the Secretary was to prevent the collector unnecessarily applying his emoluments, so as to leave nothing to be paid into the treasury, thus defeating one of the objects of the law of 1822.

If Mr. Woodbury had intended to fix the claimant's compensation for all future time, he had no power to do so, even with the consent of the then collector, because the power was a continuing one, which his successor could exercise as well as he.

But each collector had the power, aside from the special law, operating from 1832 to 1841, of determining the number of clerks he would employ, and the maximum of their compensation, subject, of course, to be cut down or limited by the Secretary, as to number and compensation, to avoid unnecessary expenses.

D. The return of the collector in 1843 shows claimant's salary was only $1,400.

This joint power has been exercised by the collector and Secretary, upon whom it was conferred, and no tribunal can review or change their action.

If the complainant was not satisfied with the compensation which the collector and Secretary consented to allow him, he should not

have remained in service. They have acted upon his case, and their action is conclusive against his recovery.

R. H. GILLET, *Solicitor.*

MAY 26, 1858.

IN THE COURT OF CLAIMS.

NOVEMBER 28, 1859.

ABRAHAM MARTIN *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

The petitioner, for many years prior to January 1, A. D. 1846, and from that time to November 1, A. D. 1846, and from June 1, A. D. 1849, to July 1, A. D. 1853, was cashier in the custom-house of Philadelphia. He alleges that, for the periods intervening between January 1, A. D. 1846, and November 1, A. D. 1846, and from June 1, A. D. 1849, to July 1, A. D. 1853, he was entitled to a salary of $2,700 a year; but for the first period he was paid at the rate of only $1,400 a year, and for the second he received only $6,265 38; and that there is a balance now due him by the United States on this account of $5,840 47.

The act of Congress approved March 3, A. D. 1837, provided as follows: "That the Secretary of the Treasury be authorized to extend to the collector at such other ports where a surplus of emoluments have been accounted for and paid into the treasury in the year eighteen hundred and thirty-two the privilege granted to the collector of New York, to take effect from the first of January last." (5 Stat. at L., p. 175, ch. 33, § 2.)' From 1832 to 1837 the petitioner's salary was $660 a year; in 1837 it was increased to $1,000 a year; and under the act of March 3, A. D. 1837, it was further increased to $1,400 a year. (See letter of Commissioner of Customs to the assistant solicitor of this court, of December 10, A. D. 1856, and the statement made under the act of 1841.)

By the act of Congress approved March 3, A. D. 1839, an appropriation of $15,000 was made "for paying the clerks in the custom-house at Philadelphia the arrears of their salaries from eighteen hundred and thirty-two to eighteen hundred and thirty-seven, so as to make the same equal to what they received in the last-mentioned year, on the same principle as has been applied in New York." (5 Stat. at L., p. 347, ch. 82, § 1.) Under the distribution made of this appropriation, the petitioner received $2,210 27. (See copies, "No. 1" and "No. 2," certified by the Secretary of the Treasury, May 28, A. D. 1858.)

The amount appropriated by the act of 1839 proving insufficient for the purposes contemplated by it, a further provision was made by the act of March 3, A. D. 1841, as follows: "That the Secretary of the Treasury be, and he hereby is, authorized and required to pay to

the clerks in the custom-house at Philadelphia such sum of money as, with the amount appropriated by the general appropriation act of the third of March, eighteen hundred and thirty-nine, will make up the arrears of their respective salaries from eighteen hundred and thirty-two to eighteen hundred and thirty-seven; the sum to be so paid being first ascertained by the proper accounting officers of the treasury." (5 Stat. at L., p. 432, ch. 35, § 4.) Under this act the petitioner received the sum of $1,489 73. From the official statement showing how this result was reached, it appears that the petitioner's salary from 1832 to 1837 was $660 a year; that in 1837 it was $1,400; that the amount due him from 1832 to 1837 was $3,700; that under the act of 1839 he received $2,210 27; and that under the act of 1841 he was entitled to receive $1,489 73. (See copies, "No. 1," "No. 2," and "No. 3," certified by the Secretary of the Treasury, May 28, A. D. 1858.)

It appears, too, from the "list of officers, clerks, messengers, watchmen, laborers, &c., employed in the district of Philadelphia, January, 1843," on file in this case, that the petitioner's salary was at that time $1,400 a year; and from a memorandum annexed to it, that the addition made to the salaries of clerks by the act of March 3, A. D. 1837, was considered permanent.

But the collector at Philadelphia, in a letter to the Secretary of the Treasury dated October 12, A. D. 1837, said: "I should be pleased to have Mr. Martin placed in some degree, in point of salary, on an equality with gentlemen of the same official grade in other custom-houses, where, from the assistants provided them, their duties must be far less laborious." On the 16th day of October, A. D. 1837, the collector again wrote to the Secretary, but a copy of that letter is not on file in this case. The Secretary, in a letter to the collector dated October 24, A. D. 1837, said: "In reply to your letter of the 16th instant, recommending an increase of the compensation of Mr. A. Martin, cashier and bond clerk in your office, so as to make his salary equal in amount to what is received by persons holding similar situations at New York and Boston, I have to remark that whilst the department has the disposition to place him on a footing with others discharging similar duties elsewhere, it has to regret the want of power to do so, there being no fund at its disposal applicable to this object. Should there prove to be any surplus emoluments in your office at the close of the year, the proposed increase may be made therefrom." In a letter from the office of the Commissioner of Customs dated August 10, A. D. 1853, it is stated that under the authority thus given, the collector at Philadelphia allowed the petitioner a salary of $2,700 a year, which he continued to receive until December 31, A. D. 1845.

In a letter from the same office dated December 10, A. D. 1856, it is stated that the petitioner was paid at the rate of $1,400 a year for the year 1846; and in a letter from the same office dated March 26, A. D. 1858, it is stated as follows: "The salary designated by the collector of Philadelphia for Mr. Martin, and approved by the Secretary of the Treasury in 1845, was at the rate of $1,400 a year, at which rate he was regularly paid, in the modes described, during his

continuance in office; and the rate thus fixed at that time has ever since been and still continues to be paid to those who have succeeded him."

In another letter from the same office dated May 28, A. D. 1858, it is stated as follows: "Mr. Martin was paid at the rate of $1,400 from January 1 to October 31, 1846, when he was superseded. His successor was also paid at that rate from November 1, 1846, to 31st May, 1849. Mr. Martin was reappointed, at the same salary, on the 1st of June, 1849, and was paid at the rate of $1,400 up to the 22d of October, 1850, when it was increased by the Secretary of the Treasury to $1,600 *per annum*, as will be seen by a certified copy of his letter of that date herewith furnished, marked A.

"Mr. Martin was paid from and after the date last mentioned, and during his continuance in office, at the rate thus fixed by the Secretary of the Treasury, as well as his successors, up to the 21st of August, 1855, when the Secretary of the Treasury, by his letter dated the 22d of August, 1855, (a certified copy of which is also herewith furnished, marked B,) approved the appointment of Casper Shunk as cashier, and fixed his salary at $1,500 *per annum*, at which rate the cashier has ever since been and still continues to be paid."

The act of Congress of May 7, 1822, provides, "that the Secretary of the Treasury may, from time to time, limit and fix the number and compensations of the clerks to be employed by any collector."—(3 Stat. at L., p. 695, ch. 107, § 15.) This act still continues in force.

Our inference from the evidence is, that the addition made by the collector to the petitioner's salary under the authority of the Secretary's letter of October 24, A. D. 1837, was either not made for the year 1837, or was not considered as a part of his permanent salary. The Secretary's direction was special: "Should there prove to be any *surplus emoluments* in your office at the close of the year, the proposed increase may be made *therefrom*." This allowance, whether it is to be regarded as confined to the year 1837 or as continuing thereafter till otherwise directed, was contingent—depending upon the actual existence of *surplus emoluments* in the collector's office at the close of the year. It ought not, therefore, to have been regarded as a part of the petitioner's regular salary. At all events, it is clear from the evidence that from 1832 to 1837 the petitioner was paid, under the acts of 1839 and 1841, at the rate of $1,400 a year, and not at the rate of $2,700 a year. It is also clear from those acts themselves that they in no respect relate to the periods embraced by the present claim.

If the direction given by the Secretary in his letter of the 24th of October, A. D. 1837, had continued in force during the periods embraced by the present claim, still it would be necessary for the petitioner to show at least that there was, at the close of each year during those periods, actual surplus emoluments in the collector's office. No attempt has been made to show this, and it is denied by the United States.

But it is expressly stated by the Commissioner of Customs in his letter of March 26, A. D. 1858, that "the salary designated by the

collector of Philadelphia for Mr. Martin, and *approved* by the Secretary of the Treasury in 1845, was at the rate of $1,400 a year." This arrangement was, under the act of 1822, valid and effectual, and necessarily a revocation of the order of the 24th of October, A. D. 1837. Being made in the year 1845, it was not applied till after the expiration of that year. It continued in force and was acted upon until the 22d of October, A. D. 1850, when the petitioner's salary was increased to $1,600 a year by a similar order of the Secretary, made under the authority of the act of 1822. The Secretary had express authority, under that act, from time to time to *limit* and *fix* the petitioner's salary. It seems to us, therefore, that the petitioner's claim cannot be sustained.

Our opinion is, that the petitioner is not entitled to relief.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 244.

JAMES L. EDWARDS, ADMINISTRATOR OF THOMAS R. GEDNEY, DECEASED.

[To accompany Bill H. R. C. C. No. 97.]

FEBRUARY 11, 1860.—The Court of Claims submitted the following report; which, together with the accompanying bill, was referred to the Committee of Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JAMES L. EDWARDS, ADMINISTRATOR OF THOMAS R. GEDNEY, DECEASED, *vs.* THE UNITED STATES:

1. The petition of the claimant.
2. Original vouchers filed by the claimant, and transmitted to the House of Representatives.
3. Documentary evidence filed by the government, transmitted to the House of Representatives.
4. United States deputy solicitor's brief.
5. Opinion of the court.
6. Order of the court allowing administrator to appear.
7. Certified copy of letters of administration transmitted to the House of Representatives.
8. Bill allowing claimant $496 60.

The petition of T. R. Gedney to Congress, and accompanying papers, received from the House of Representatives under the resolution of February 21, 1856, returned to that house in a separate envelope.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, at Washington, this 5th day of December, A. D. 1859.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

To the judges of the Court of Claims:

The petition of Thomas R. Gedney, late a commander in the navy of the United States, respectfully shows: That he was for several years the disbursing officer in the Coast Survey service, and, as such, several settlements of his accounts were successively made at the Treasury Department. On the last, the First Auditor, on the 30th of June, 1847, certified thus: "I have examined and adjusted an account between the United States and Thomas R. Gedney, late disbursing agent of the Coast Survey, and find the sum of one thousand six hundred and fifty-five dollars and ten cents is due to him from the United States for disbursements made by him in the prosecution of said survey, allowed per instructions of the First Comptroller of the Treasury, dated June 25, 1847, filed herewith, and payable out of the appropriation to defray the expenditures on account of said Coast Survey, as appears from the statement and vouchers herewith transmitted for the decision of the Comptroller thereon.

"WILLIAM COLLINS, *First Auditor.*"

On this report the Comptroller indorses: "I admit and certify the above balance this 30th June, 1847, to be paid on or after the 1st July, 1847.

"J. W. McCULLOUGH, *Comptroller.*"

The entry of the Register shows these facts, and states the report as number 96617. It is understood that doubts being entertained whether it was properly chargeable on the then current appropriation for the Coast Survey, and the Secretary of the Treasury (Mr. Walker) having received intimations that allowances had been made which should have been rejected, a portion of the accounts were referred by him to Mr. Bache, the Superintendent of the Coast Survey. In October, 1847, Mr. Bache made a report to the Secretary, denying the correctness of the settlement, and rejecting the balance entirely. On November 13, 1848, the Secretary indorsed on the report of Mr. Bache: "The opinion of the Superintendent of the Coast Survey, as well as my own, is decidedly against this claim."

In 1849 Mr. Meredith, then Secretary, instructed Mr. Whittlesey. then First Comptroller, to re-examine the accounts of Captain Gedney; and on the 3d of July, 1849, he reported, after stating the principles on which the decisions of the accounting officers might be opened, thus: "Having carefully examined all the papers, I find no mistakes in matters of fact nor errors in calculation—the decisions and proceedings of the Auditor and Comptroller are unreversed, and to my mind in full force. The account of Captain Gedney, as stated and certified, finding that there is due him the sum of $1,655 10, in the usual and established form of certifying accounts allowed against the United States, is herewith sent to the Secretary of the Treasury for his action thereon."

On September 22, 1849, Mr. Meredith indorsed on this report that he declined acting on the case, because Mr. Walker had refused to allow the claim; and on an application to Mr. Corwin, the successor

of Mr. Meredith, he, on the 22d May, 1851, refused to act, because his predecessor had; but, in an official letter dated August 12, 1852, to Senator Gwin, he says: "The amount claimed has been duly audited and allowed by the proper accounting officers, and would have been paid at once had the question been originally presented to me."

No subsequent action has been had before the department.

Your petitioner avers that by the several laws organizing the Treasury Department, (Stat. at L., vol. i, pp. 66, 67, vol. iii, p. 366,) and the practice of the government since 1789, the proper Auditors and Comptrollers had the exclusive power of settling all accounts against the United States; that when settled, they could not themselves reopen them, except under peculiar circumstances, none of which exist in this case.—(*Vide* Brockenborough's Rep., vol. ii, pp. 473, 474; Peters, vol. xv, p. 401.)

If *they* could not do it, much less could *any* officer refer their decisions to a stranger. No part of the amount so found due on June 30, 1847, has been paid, and your petitioner therefore prays that you will report a bill for his relief.

A memorial was presented to the 32d Congress and to the 33d Congress by the petitioner or his then assigns, but no report was made or action taken by either.

This is, as your petitioner thinks, as brief a history of his case as he could give, though it might be much elaborated, and this he is not disposed to do.

THOMAS R. GEDNEY.

DISTRICT OF COLUMBIA,
City and County of Washington, } *ss:*

Before me, on this 7th day of May, 1856, came in person Daniel Rowland, attorney in fact for the petitioner, Thomas R. Gedney, and made solemn oath that the several matters above set forth are verily true, as he believes.

DAN. ROWLAND.

Sworn and subscribed before me.

N. CALLAN, *J. P.* [L. S.]

BABYLON, *June* 10, 1840.

United States Coast Survey to W. A. Wheeden, Dr.

To lodging one night, and transportation of baggage and instruments to Beacon Hill ..... $3 00.

Received payment.

For W. A. WHEEDEN.
BENJAMIN T. COE.

United States Coast Survey to John Doyle, Dr.

To transportation of officers at sundry times, while on duty in connexion with Coast Survey, from May, 1840, to November, 1844 ..... $95 00

NEW YORK, *November* 30, 1844.

Received from Commander Thomas R. Gedney the sum of ninety-five dollars, in full for the above bill.

$95. JOHN DOYLE.

Witness: NATHANIEL THORNE.

BALTIMORE AND OHIO RAILROAD,
Washington Branch, November 1, 1842.

Mr. L. G. Humphreys, (on Coast Survey service,) Dr.

For transportation and charges on one package:

From Baltimore to Washington	$0 37
Charges paid in Baltimore	2 70
	3 07
Cartage	37
	3 44

Received payment.

JNO. C. MELLET, *Agent.*

NEW YORK, *June* 6, 1843.

Captain T. R. Gedney (on Coast Survey service) to schooner Phœbe Eliza, Dr.

To freight on three boxes, 29 pounds, at 8 cents	$2 32
To freight on one set of ——	13
	2 45

Received payment.

WILLIAM OSBORN.

United States Coast Survey to J. Jones, Dr.

To carriage hire for fourteen days, at sundry times, to visit Mr. Hassler at different stations, from 1840 to 1843, at five dollars per day $70 00

PHILADELPHIA, *September* 10, 1843.

Received from Commander Thomas R. Gedney the sum of seventy dollars, in full for the above bill.

$70. JOHN A. JONES.

I certify that the within account is just and true, and that I have paid the same, and have never received credit for any part of the amount stated.

THOMAS R. GEDNEY.

MARCH 18, 1847.

United States Coast Survey to Nathaniel Thorne, Dr.

To services on Coast Survey, at $18 per month, from April 18, 1840, to December 31, 1843, being 44 months and 13 days	$799 80

NEW YORK, *January* 2, 1844.

Received from Commander Thomas R. Gedney the sum of seven hundred and ninety-nine dollars and eighty cents, in full for the above bill.

$799 80. NATHANIEL THORNE.

United States Coast Survey to John H. Simpson, Dr.

To pilotage on board the United States surveying brig Washington, from May 2 to July 2, 1841, two months, at $40 per month	$80 00

NEW YORK, *July* 2, 1841.

Received from Commander Thomas R. Gedney the sum of eighty dollars, in full of the above bill.

his
JOHN H. + SIMPSON.
mark.

Witness: MICHAEL FITZPATRICK.

I certify that the services within stated were performed, and that I paid the amount stated, and have never received credit for any part of the same.

THOMAS R. GEDNEY.

MARCH 18, 1847.

United States Coast Survey to R. Brown, Dr.

To pilotage of the United States brig Washington from sea to New York, at $5 per foot, the brig drawing 11 feet	$55 00
From New York to sea, at the same rate	55 00
Five days' detention, at $3 per day	15 00
Commissioner's fee	5 00
	130 00

NEW YORK, *September* 6, 1842.

Received from Commander Thomas R. Gedney the sum of one hundred and thirty dollars, in full for the above bill.

his
RICHARD + BROWN.
mark.

Witness: NATHANIEL THORNE.

By reference to voucher No. 5, with report 86962, it will be seen that I have paid Richard Brown, pilot, from May 24 to November 11, inclusive, at the rate of $84 per month and two rations per day, amounting to $540 84. I now present a bill for $130, paid by me to said Richard Brown for pilotage of the brig in and out of port within the period above stated, with the following explanation, viz: When I made the agreement with Brown to allow him at the above rate to get his services from the commissioners of pilotage, I was obliged to agree to make him the above allowance for pilotage of the brig in and out of port.

THOMAS R. GEDNEY.

MARCH 18, 1847.

United States Coast Survey to P. Schenck, Dr.

To 1,200 feet pine boards, at 4 cents	$48 00
600 feet scantling, at 3 cents	18 00
	66 00

NEW YORK, *December* 1, 1841.

Received from Commander Thomas R. Gedney the sum of sixty-six dollars, in full for the above bill.

$66. PETER W. SCHENCK.

I certify, on honor, that the within account is just and true, was paid by me, and I have never received credit for any part of the same.

THOMAS R. GEDNEY.

MARCH 18, 1847.

United States Coast Survey to J. Jones, Dr.

To quarters for one officer and one man at sundry times, from 1840 to December, 1843, while detained on shore on duty in connexion with Coast Survey—in all 13 weeks—at ten dollars per week for officer, and six dollars per week for man	$208 00

PHILADELPHIA, *December* 1, 1843.

Received from Commander Thomas R. Gedney the sum of two hundred and eight dollars, in full for the above bill.

$208. JNO. A. JONES.

I certify, on honor, that the within bill was paid by me, and that I have never been credited with any part of the same.

THOMAS R. GEDNEY.

MARCH 18, 1847.

United States Coast Survey to N. W. Bridges, Dr.

To quarters for one officer at sundry times, from 1839 to 1841, while detained on shore on duty in connexion with Coast Survey—in all 8 weeks and 3 days—at ten dollars per week $84 29

PHILADELPHIA, *November* 3, 1841.

Received from Commander Thomas R. Gedney the sum of eighty-four dollars and twenty-nine cents, in full for the above bill.

$84 29. N. W. BRIDGES.

I certify, on honor, that the within account was paid by me, and that I have never received credit for any part of the same.

THOMAS R. GEDNEY.

MARCH 18, 1847.

United States Coast Survey to William Fischer, Dr.

1843.		
June 1	4 cards lithographing pens, $3 50; 8 sheets antiquarian, $7 20	$10 70
April 19	3 quires letter, $1; bottle ink, 12 cents; 1 card pens, 50 cents	1 62
30	2 Congress knives, $4; (May 21) 2 cakes colors, 37 cents	4 37
30	Sepia, 37 cents; carmine, $1; 2 sticks India ink, 75 cents	2 12
July 20	4½ quires tissue paper, $1 68; red ink, 20 cents	1 88
Aug. 16	1 card lithographing pens	88
Sept. 6	2 cards pens, 75 cents; (16) 2 knives, 25 cents; 6 pieces mouth glue, 37 cents	1 37
6	Blank book, $1 37; (23) 1 quire letter, 19 cents	1 56
20	India ink, 25 cents; (24) 12 sheets tracing, $6	6 25
20	4 quires ruled letter, $1 25; 25 quills, 75 cents	2 00
Dec. 5	8 sheets antiquarian paper, $7; ink and wafers, 25 cents	7 25
14	1 gross curve-cut pens, $3; pen-holder, 12 cents; wafers, 6 cents	3 18
21	1 card pens, 37 cents; ink, 11 cents; China cup, 12 cents	68
28	2 drawing pencils, 20 cents; blank book, 37 cents	57
Jan. 8	½ ream best white post, $2 50; ½ ream cap, $2 50	5 00
8	1 bottle ink, 37 cents; red ink, 13 cents; 2 Congress knives, $6	6 50
8	½ pound wax, 62 cts.; 1 dozen pencils, $2; 2 cards M. pens, $1 75	4 37
8	3 cards pens, $1 75; 2 patent inkstands, $2 50	4 25
8	2 cork inks, 13 cents; wafers, 10 cents; 4 pen-holders, 50 cents	73
11	3 cards M. pens, $1 62; (22) 2 gross phial corks, 50 cents	2 12
30	Congress knife, $2; India-rubber, 19 cents; quills, 75 cents	2 94
31	4 gross phial corks	1 00
31	4 paint cups, 37 cents; (6) 3 quires best cap, 94 cents	1 31
Feb. 12	1 cake paint, 19 cents; (14) cards pens, $2 50	2 69
15	Knife, $1 50; 100 largest envelopes, $2	3 50
20	2 bottles carmine, 75 cts.; vermilion, 19 cts.; 1 card pens, 37 cts.	1 31
23	2 sheets antiquarian, $1 75; (24) 50 envelopes, 50 cents	2 25
26	1 card lithographing pens, 87 cents; Step. Mar. Surveying, $4 25	5 12
Mar. 14	2 sheets double elephant, 62 cents; 1 card pens, 37 cents	1 00
18	25 quills, 62 cents; ruled paper, 25 cents; blank book, $1 25	2 12
26	1 card pens, 62 cents; (April 3) 5 quires paper, $1 50	2 12
26	2 quires gilt note, 50 cents; wafers, 19 cents	69
April 26	1 card M. pens, 88 cents; India ink, 37 cents	1 25
29	2 sheets double elephant, 75 cents; (May 2) 5 sheets double elephant, $1 87	2 62
4	4-bladed knife, $2; (July 15) 1 sheet drawing, 30 cents	2 30
Aug. 21	4 sheets double elephant	1 50
21	Mouth glue, 62 cents; China slab, 25 cents; 4 cards lithographing pens, $3 50	4 37
21	8 sheets antiquarian drawing paper	7 20
21	1 quire letter, 31 cents; 2 boxes leads, 12 cents; (omitted above)	44
		113 12

WASHINGTON, *August* 20, 1844.

Received from Commander Thomas R. Gedney the sum of $113 12, in full of the within account.

WILLIAM FISCHER.

NAVY DEPARTMENT, *December* 2, 1859.

SIR: The department informs you, in reply to your request of the first instant, that Thomas R. Gedney was an officer in the naval service of the United States during the period from January 1, 1836, to December 31, 1843. His position was a lieutenant from the first named date to the 8th of September, 1841, when he was promoted to the rank of a commander. During the entire period, to wit, from January 1, 1836, to December 31, 1843, he was employed on the Coast Survey.

I am, respectfully, your obedient servant,

ISAAC TOUCEY.

J. D. MCPHERSON, Esq.,
Deputy Solicitor, Washington, D. C.

NAVY DEPARTMENT, *December* 2, 1859.

Thomas R. Gedney was "an officer in the naval service of the United States" during the period from January 1, 1836, to December 31, 1843. His position was a lieutenant from the first named period to the 8th of September, 1841, when he was promoted to the rank of a commander. During the entire period from January 1, 1836, to December 31, 1843, he was employed on the Coast Survey.

CHARLES W. WELSH, *Chief Clerk.*

AGAMENTICUS, NEAR SOUTH BURWICK, MAINE.,
October 26, 1847.

SIR: I have examined the accounts of Commander Gedney, United States navy, assistant in the Coast Survey, transmitted by your direction from the department, and have also referred them to the general disbursing agent of the Coast Survey, whose report is hereto annexed, (marked I.)

The vouchers were included in two abstracts, marked A & B, arranged according to their dates; they will be found appended, (marked II.)

Of these, the following three are, in my opinion, inadmissible, as they stand at present, for the reasons given below:

No.	Abstract	Date.	Name.	Object.	Amount.
10	B.	June 2, 1844.	Nathaniel Thorne	Services	$799 80
4	A.	Oct. 31, 1844.	F. Richardson	Quarters	138 00
15	A.	March 8, 1847.	Thomas R. Gedney	Commissions	1,020 50
					1,958 30

The voucher in favor of Nathaniel Thorne, according to Mr. Hein's report, covers a time during which the same person was paid in another account for services. As the document referred to as explanatory of this account did not accompany the vouchers sent to the Coast Survey office from the Treasury Department, and as Captain Gedney has declined giving me an explanation, I must of course, in view of the facts, report this as inadmissible. My letter to Captain Gedney dated August 23, his reply dated October 13, and my answer to him dated October ——, are appended, marked (III one, III two, III three.)

The account of F. Richardson, for quarters for Lieutenant Stembel in 1844, is inadmissible as contrary to express regulations, (Coast Survey Regulations, par. 6, section V.) When applied to by Captain Gedney, before the order was given to Lieutenant Stembel, I informed him that no such allowance could by the regulations be made. This account was accordingly rejected by the general disbursing agent of the Coast Survey on presentation.

My letter of October 21, to Mr. Hein, inquiring if other officers of the navy have received an allowance similar to that claimed in this voucher, and his reply of October 22, are annexed, (marked IV one, IV two.)

The claim to an allowance for disbursements is not founded in equity, as Captain Gedney received, during the time for which the claim is made, a specific payment from the Coast Survey for his services. Its allowance would be in contravention of an act of Congress of March 3, 1835.

The second section of the act of March 3, 1835, entitled "An act to regulate the pay of the navy of the United States," provides "that no allowance shall hereafter be made to any officer in the naval service of the United States for drawing bills, for receiving or disbursing money, or transacting any business for the government of the United States," &c. A more full copy of the extract of this act is herewith appended, (marked V.)

Should this law have been repealed, (and I have not been able to ascertain that it has been,) and the department determine that Captain Gedney is entitled to an allowance over and above that formerly received by him, his case, and that of others on precisely the same footing, should, in my opinion, be made subjects of application for a special appropriation, as to take the amount from the appropriation for the survey of the coast in 1847–'48 would be inexpedient, if, indeed, not contrary to law.

The following accounts are so informal as to render it doubtful if they should be passed; none such could be passed at the present time :

No	Abstract.	Date.	Name	Object.	Amount.
7	A.	May 18, 1841	C. W. Chauncey.....	Use of Coast Survey..	$187 63
2	B.	July 2, 1841	N. W. Bridges.....	Quarters	84 29
10	A.	Dec. 1, 1841	P. W. Schrack.....	Quarters, &c.....	548 72
8	A.	Oct. 30, 1843	R. Brown.....	Pilotage.....	127 00
3	B.	Dec. 1, 1843	F. A M Jones.....	Quarters.....	208 00
					1,155 64

Voucher 7 consists of an order from Captain Gedney upon Mr. John Gardiner, proprietor of the City Hotel, New York, to pay to Lieutenant Chauncey the sum of $187, of the receipt of Lieutenant Chauncey for the same, and of his certificate that he believed the amount was expended for the use of the Coast Survey. The decease of the disbursing officer, or some calamity which should have swept away his accounts and vouchers, would alone warrant the passing of such an account.

Vouchers 2 and 10 are for quarters of officers and men and transportation during the years 1839–'40, and 1841, and prior to the year 1843, when the present regulations of the Coast Survey went into operation. The names of the officers for whom these expenses were incurred are not given, nor is there any particularity in the dates. Mr. Hein states that several accounts of the same character, and to a large amount, were disallowed by the disbursing agent (Captain Boyce) in 1843, but afterwards passed to Captain Gedney's credit by sanction of the Secretary of the Treasury.

Voucher No. 3 is for quarters of one officer and one man for 13 weeks, at $10 for officer and $6 for man per week. The whole of these are liable to the objections already stated to 2 and 10, and the part incurred subsequent to the date of the regulations of 1843 is in contravention of those regulations.

Voucher 8 is for pilotage of the brig Washington out and into the harbor of New York in 1843. As Mr. Brown was at that time receiving monthly pay for pilotage from the Coast Survey, this voucher was disallowed. I understand that it was afterwards, upon the representation of Captain Gedney that it was according to agreement that extra pilotage should be paid for carrying the brig out and into the harbor, passed in the Treasury Department. Mr. Hein, in his report, states: "As Captain Gedney drew at that time (1843) the funds for expenditures of his party from the disbursing agent of the Coast Survey, this account should have been presented to that officer."

In conclusion, I would observe that the delay in this report has been caused by the delay in Commander Gedney's answer to my letter requesting explanations of certain of his accounts, caused in part if not entirely by his absence from home and his subsequent sickness. Respectfully submitted by

A. D. BACHE,
Supt. U. S. Coast Survey.

Hon. R. J. WALKER, *Secretary of the Treasury.*

OFFICE OF THE COAST SURVEY,
Washington, July 31, 1847.

SIR: Conforming to your letter referring to me the last two abstracts of Lieut. Commanding Thomas R. Gedney's accounts, and directing "to classify them under certain, doubtful, and inadmissible, with remarks," I beg leave to report:

Abstract marked A consists of the following vouchers:

No. 4.—October 31, 1844. S. Richardson, for quarters	$138 00
No. 5.—June 30, 1842. F. Francis, for life-boat	?218 12
No. 8.—October 30, 1843. R. Brown, for pilotage	127 00
No. 10.—December 1, 1841. P. W. Schrack, for quarters, &c.	548 72
No. 14.—March 8, 1847.—Thomas R. Gedney, for transportation	199 25
No. 15.—Thomas R. Gedney, for commission	1,020 50
No. 7.—May 18, 1841. C. W. Chauncey, for use of Coast Survey	187 63
	?2,439 27

Classification.	Certain.	Doubtful.	Inadmissible	
Vouchers 5 and 4	$417 42?			
Voucher 8		$127 00		
Voucher 10		548 72		
Voucher 4			$138 00	
Voucher 15			1,020 50	
Voucher 7			187 63	
	417 42?	675 72	1,346 13	$2,439 27?

Remarks to certain.—Is for expenses incurred before 1843.

Remarks to doubtful.—Voucher 8 is for piloting brig Washington out and into the harbor of New York in 1843. As Captain Gedney drew at that time the funds for expenditures of his party from the disbursing agent of the Coast Survey, this account should have been presented to that officer.

Voucher 10 is for quarters for officers and men $505 72, and for transportation $33, during the years 1839, 1840, and 1841. No nearer dates nor names stated. Several accounts of the same character, and to large amounts, were disallowed by the disbursing agent of the Coast Survey in 1843, but afterwards passed to Captain Gedney's credit by sanction of the Secretary of the Treasury.

Remarks on inadmissible.—Voucher 4 is for quarters for Lieut. R. N. Stembel in 1844. This voucher was disallowed by the disbursing agent of the Coast Survey in 1845, as contrary to the regulations of the Coast Survey, and the direction of the Superintendent to Lieut. Comd'g Gedney.

Voucher 14 is for 2½ per cent. commission on disbursements made by Lieut. Comd'g Thomas R. Gedney, from 1836 to 1843, when in charge of a hydrographic party on the Coast Survey. Comd'r Thomas R. Gedney made disbursements for his party alone, like every other assistant of the survey in charge of a party. The reason why Captain Gedney drew the advances for his party expenses direct from the Treasury Department is not known to me, but should suppose it was an accommodation to him, as he was thus enabled to settle his accounts at his convenience, and was not obliged, like every other assistant of the survey, to do it monthly.

Voucher 7. I enclose copy of this voucher; the expense was made in 1841, for what purpose is not stated; but in 1844, Lieut. Charles W. Chauncey certifies that, to the best of his belief, it was expended for the use of the Coast Survey.

Abstract marked B consists of the following vouchers:

No. 1.—August 20, 1844. W. Fischer, for stationery	$113 12
No. 2.—November 3, 1841. N. W. Bridges, for quarters	84 29
No. 3.—December 1, 1843. F. A. M. Jones, for quarters	208 00
No. 6.—December 1, 1841. P. W. Schenck, for scantling &c.	66 00
No. 7.—September 6, 1842. R. Brown, for pilotage	130 00
No. 10.—January 2, 1844. Nathaniel Thorne, for services	799 80
No. 9.—July 2, 1841. J. H. Simpson, for pilotage	80 00
No. 11.—September 10, 1843. F. A. M. Jones, for transportation	70 00
No. 12.—June 6, 1843. W. Osborne, for freight	2 45
No. 13.—November 1, 1842. Railroad, for freight	3 44
No. 15.—November 30, 1844. John Doyle, for transportation	95 00
No. 35.—June 10, 1840. W. A. Wheeden, for transportation	3 00
	1,655 10

Classification.	Certain.	Doubtful.	Inadmissible	
Voucher 1	$113 12			
Voucher 2		$84 29		
Voucher 3		208 00		
Voucher 6	66 00			
Voucher 7	130 00			
Voucher 9	80 00			
Voucher 10			$799 80	
Voucher 11	70 00			
Vouchers 12 and 13	5 89			
Voucher 15	95 00			
Voucher 35	3 00			
	563 01	292 29	799 80	$1,655 10

Remarks to certain.—Vouchers Nos. 1, 11, 12, 15, are for expenses incurred in 1843 and 1844. In those years Captain Gedney drew funds for his party expenses from the disursing agent of the Coast Survey, and the accounts should have been presented to that officer.

Vouchers 6, 7, 9, 13, 35, are all incurred before 1843.

Remarks to doubtful.—Voucher 2 is for quarters of one officer, at Philadelphia, for eight weeks and three days during the years 1839, 1840, and 1841. No nearer dates nor names stated. Voucher 3 is for quarters of one officer and one man. at Philadelphia, at sundry times from 1840 to December 1, 1843, 13 weeks, at $10 for officer and $6 for man per week.

The same remarks apply to these two vouchers as stated to voucher No. 10 in abstract A.

Remarks to inadmissible.—Nathaniel Thorne, $799 80, for services on Coast Survey, from April, 1840 to December 31, 1843, at $18 per month.

It appears from Anditor's report, No. 86686, that the sum of $262 28 was already allowed to Nathaniel Thorne for services rendered for part of the time charged in the above voucher.

It would, therefore, not be admissible without an explanation.

Respectfully submitted by

SAMUEL HEIN,
Disbursing Agent Coast Survey.

Prof. A. D. BACHE,
Supt. U. S. Coast Survey, Gloucester, Mass.

Extract of "An act to regulate the pay of the navy of the United States."

SECTION 2. *And be it further enacted*, That no allowance shall hereafter be made to any officer in the naval service of the United States for drawing bills, for *receiving or disbursing money*, or transacting any business for the government of the United States; nor shall he be allowed servants, or pay for servants, or clothing, or rations for them, or pay for the same; nor shall any allowance be made to him for rent of quarters, or to pay rent for furniture, or for lights, or fuel, or transporting baggage. It is hereby expressly declared that the yearly allowance provided in this act is all the pay, compensation, and allowance, that shall be received, under any circumstances whatever, by any such officer or person, except for travelling expenses when under orders. for which ten cents per mile shall be allowed.

Approved March 3, 1835.

IN THE COURT OF CLAIMS.

No. 590.

THOMAS R. GEDNEY *vs.* THE UNITED STATES.

Brief of the United States Solicitor.

The petitioner seeks to recover the sum of $1,655 10, which he alleges was found due to him from the United States, upon an account settled by the proper accounting officers of the treasury.

On the part of the United States it is contended—

I.—The accounting officers of the treasury act, in the adjustment and settlement of accounts, exclusively as ministerial officers; they exercise no part of the judicial power, and a treasury settlement has effect only as an account stated, not as a judgment in a judicial proceeding. In Ex parte Randolph, (2 Brock., 479,) Chief Justice Marshall said:

"The act of Congress, under the authority of which the process by which Mr. Randolph was imprisoned was issued, makes it the duty of certain officers of the treasury to settle, and caused to be stated, the account of any collector of the revenue, &c.

* * * * * * *

"If this ascertainment of the sum due to the government, and this issuing of process to levy the sum so ascertained to be due, be the exercise of any part of the judicial power of the United States, the law which directs it is plainly a violation of the first section of the third article of the Constitution, which declares that 'the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior.' The judicial power extends to 'controversies to which the United States shall be a party.'

"The persons who are directed by the act of Congress to ascertain the debt due from a delinquent receiver of public money, and to issue process to compel the payment of that debt, do not compose a court ordained and established by Congress, nor do they hold offices during good behavior. Their offices are held at the pleasure of the President of the United States. They are, consequently, incapable of exercising any portion of the judicial power, and the act which attemps to confer it is absolutely void. In considering the validity of this act, therefore, it is necessary to discard every idea of its conferring judicial power. We must not view the statement or certificate of the account as a judgment, or the warrant which coerces payment as judicial process. They must be viewed as mere ministerial acts performed by mere ministerial agents. They cannot be otherwise sustained.

"I will for the present assume that the power of collecting taxes, and of disbursing the money of the public, may authorize the legislature to enact laws by which the agents of the executive may be em-

powered to settle the accounts of all receiving and disbursing officers, and to issue process in the nature of an execution, to compel the payment of any sum alleged to be due. But these agents are purely ministerial, and their acts are, necessarily, to be treated as ministerial acts. The inevitable consequence is, that their validity must be decided by those legal principles which govern all acts of this character. These require that the authority, whether given by a legislative act or otherwise, must be strictly pursued. Such agents cannot act on other persons or on other subjects than those marked out in the power, nor can they proceed in a manner different from that which it prescribes."

In the same case, Barbour, Justice, said:

* * "Another question arises which, in my opinion, is decisive of the case; and that is, after the Auditor shall once have settled an account of a public officer and closed it, as in this case, is it competent for him, at an after time, upon an allegation of error or omission, or for other cause, to open it, re-state it, and, upon the account thus re-stated, to institute proceedings by a warrant of distress against the debtor? I think it is not." * * "Let us trace the injurious consequences of a contrary doctrine. * * It seems to me that a doctrine which leads to such consequences cannot be sound; and that the government is not without ample remedy, though this power shall be denied to the Auditor. I suppose there can be no doubt that a bill in equity would lie to surcharge and falsify, as in case of a settled account between individuals, and, moreover, according to the doctrine of the Supreme Court, 11 Wheaton, 237, (Perkins *vs.* Hart,) even at law, although a settled account would be *prima facie* evidence, yet it could recover, upon proving mistakes or omissions, any sum of which it had been thus unjustly deprived," &c.

The language of Mr. Justice McLean, in the United States *vs.* Jones, 8 Peters, 344, appears to ascribe to treasury settlements the force of judgments at law, but the language was used in reference to the point whether the treasury officers *could withdraw credits once given*, and throw upon the defendant the *onus* of proving the items again. Such a right does not exist after an account has been stated; when an account has been lawfully settled in the Treasury Department, or between any private parties, it is admitted that the party who would impeach it must show the existence of circumstances which will justify the re-opening of the account.

That the language of the court should, in the above cited cause, be confined to the point made, is evident from what was afterwards said by the same court, [and the same justice,] in the United States *vs.* Eckford's Executors.—(1 Howard, 250.) Eckford was one of Swartwout's sureties; Swartwout's accounts had been settled at the treasury, quarterly; they were afterwards re-stated in a manner unfavorable to the sureties, and the question was as to the legal effect of the earlier settlements. Mr. Justice McLean, delivering the opinion of the court, said:

"It is contended that the duties of the treasury officers, charged with the settlement of these accounts, are in their nature judicial,

and that when an account is once settled it is conclusive on the government, and can only be opened for correction by a suit in court. That, in the present case, as credits were given in the account current which more than paid the moneys received within the four years under examination, the sureties must stand discharged of all liability. And that although these payments were in fact made from moneys received after the expiration of the above time, the credit must stand as entered.

"If this be a sound argument, by the mode of keeping these accounts in the Treasury Department all sureties of collectors, except those for the last term, are discharged;" which conclusion the opinion proceeds to controvert, and, in so doing, proves the argument to be unsound.

See also act of March 3, 1845, sec. 4, (5 Stat., 764,) prohibiting the opening of accounts once settled, repealed by act of August 10, 1846, sec. 5, (9 Stat., 97.)

These authorities establish conclusively that treasury settlements have not the force of judicial decisions, but only that of accounts stated between parties.

II.—But there has been no such account lawfully stated between the parties as is now set up.

1. The petitioner does not produce the proper evidence to prove such an account. He produces a report from Mr. Comptroller Whittlesey, stating the proceedings of his own predecessor and of other officers. It is contended that, under the act organizing the Treasury Department, approved September 2, 1789, sec. 6, the office of the Register of the Treasury is the proper depository of all settled accounts, (1 Stat., 65,) and that this officer only can furnish evidence of "debts due to or from the United States." See, also, act of March 3, 1797, sec. 2, (1 Stat., 512,) as to mode of proving treasury accounts in suits by the United States.* On the books of that office the petitioner stands a debtor to the United States.—(See Exhibit 6, accompanying Comptroller's letter of December 11, 1856.)

2. In the proceedings stated in the evidence, the accounting officers did not act according to law.

The act of September 2, 1789, organizing the Treasury Department, (1 Stat., 65,) prescribes the order to be pursued in the presentation and adjustments of accounts. By section 5 it is made the duty of the Auditor to receive all public accounts, and, after examination, transmit them, with the vouchers, to the Comptroller for his decision; and it is provided, that if any person whose account shall be so audited be dissatisfied, he may appeal to the Comptroller against such settlement. By section 3 it is made the duty of the Comptroller to examine all accounts settled by the Auditor, and certify the balance

*In the argument it was further objected by the deputy solicitor, under the impression that the copies of these reports, produced on the part of the petitioner, had been obtained and filed by the petitioner himself, that these papers, though admitted by agreement to be authentic copies, were not evidence, not having been obtained under the rules of the court. This impression was erroneous, as the papers had been furnished to this court by the Clerk of the House of Representatives.

to the Register. By section 6 it is made the duty of the Register to keep all accounts of receipts, &c., and of all debts due to and from the United States; to receive from the Comptroller and preserve all adjusted accounts, with vouchers, &c.

Such are the duties of the officers charged with the settlement of the public accounts.

The evidence, however, shows that the vouchers which were admitted to the credit of the petitioner in the account set up were some which had been excluded from an account previously stated, and had been returned to him by the Comptroller.—(Mr. Whittlesey's report, pp. 2, 3.) From the petitioner they went to the chief clerk of the Treasury, from the latter to the Comptroller, and by the Comptroller they were referred to the Auditor *with instructions to report in favor of the allowance.* The Auditor admitted the vouchers, as he states in the settlement itself, in obedience to these instructions.

It is submitted that this instruction, given in advance of the Auditor's examination, and precluding any examination by him, defeated the object of the statute, which was to secure an examination by the Auditor previous to the revision by the Comptroller; and also the advantage of an issue made between the Auditor and the claimant on appeal. As to jurisdiction of Comptroller in appeals, compare act of July 2, 1836, sec. 8, (5 Stat., 81,) respecting post office accounts, which he does not *revise* or *examine.*

After the account had been stated by the Auditor, and revised by the Comptroller, there is no evidence that it was sent to the Register, as required by law. The Secretary of the Treasury here interposed, and on the book kept in the Comptroller's office, entitled "Register of accounts reported by the First Auditor," &c., it is noted that this account was passed by the Comptroller on the 30th of June, 1847, and "rejected by the Secretary of the Treasury."—(See Exhibit 5, accompanying Comptroller's letter of December 11, 1856.)

The settlement was arrested before it was perfected.

The act of 1789 requires that all accounts settled by the Comptroller shall be sent to the Register of the Treasury, whose duty it is to keep accounts of all debts due to and from the United States. It was his duty, therefore, to know whether the petitioner was indebted to the United States for any moneys, advanced or otherwise, and not brought into that account; and it was essential, before declaring any debt to be due to the United States, that the account should pass through the Register's office. It is contended that the settlement was not perfected until the accounts had passed into the custody of the Register, and he had performed the duty, enjoined upon him by law, of certifying the balance to the Secretary of the Treasury.

The Secretary of the Treasury had authority to interpose and arrest the proceedings. The reasoning of Ch. J. Marshall in the case in Brockenbrough, cited above, is relied on to show that the accounting officers, being purely ministerial agents, must obey the orders of their official superiors; and the act of September 2, 1789, (1 St., 65,) making the Secretary of the Treasury the "head" of the Treasury Department, constitutes him the official superior of all the officers in it.

Such had been the relations of the superior and subordinate treasury officers for many years prior to the organization of the Treasury Department under the act of 1789.

The board of the treasury, under resolution of July 30, 1779; the superintendent of finance, under resolution of February 7, 1781; the commissioners of the treasury, under resolution of May 28, 1784, (which last resolution remained in force till superseded by the act of September 2, 1789,) all had express authority "to superintend and control the settlement of public accounts." This authority, it is contended, passed to the Secretary of the Treasury when constituted the "head" of that department. In a report of a committee of Congress, appointed to inquire into the management of the Treasury Department, dated May 22, 1794, (Am. St. Papers, VII, Finance, vol. 1, p. 285,) it was stated that "all expenditures at some period pass under the separate consideration of the Secretary, the Comptroller, and the Auditor."

Upon this subject see opinions of Attorney General Wirt, October 20, 1823, and of Attorney General Taney, April 5, 1832. These opinions concur that the President cannot order the accounting officers to admit charges against the United States. See, however, opinion of Attorney General Taney, September 10, 1831, saying that parties may appeal to the head of the department and to the President; and the opinion of Attorney General Johnson, April 19, 1849, expressly asserting the authority of heads of departments to direct the accounting officers to admit charges against the United States. The only opinion which appears to have been given by an Attorney General upon the question now under consideration, the authority of the accounting officers to admit claims without the concurrence of the head of the department, was that of Attorney General Berrien, December 4. 1829, in which that power was emphatically denied.

At this point it is to be remarked that the Secretary of the Treasury was not only the official superior of the Comptroller, but he was in charge of the work (the Coast Survey) upon which the claim accrued.

If the court sustain these views, then there is no evidence of an account stated, according to law, between the United states and the petitioner, or of any debt due from the United States to him. The petitioner must, then, if he desire to pursue his remedy in this court, state the items of his claim. and prove them according to law.

III.—But if the positions here taken be not sustained, and the court find that there has been an account stated according to law, the counsel for the United States desire to impeach the account according to the rules of law and equity.

"If to a bill for an account the defendant plead, or his answer rely upon, a settled account, the plaintiff may surcharge by alleging and proving omissions in the account, or may falsify by showing errors in some of the items stated in it.

"The rule is the same in principle at law; a settled account is only *prima facie* evidence of its correctness. It may be impeached by proof of unfairness or mistake in law or in fact; and if it be confined

to particular items of account, it concludes nothing in relation to other items not stated in it."

Perkins *vs.* Hart, 11 Wh., 256; cited and approved in Ex parte Randolph, above.

In equity accounts may be opened for "mistake or omission, or accident, or fraud, or undue advantage by which the account stated is in truth vitiated, and the balance is incorrectly fixed."—(Story's Equity, § 523.)

"The liberty to surcharge and falsify includes not only an examination of errors of fact, but of errors of law."—(Id., § 524.)

The evidence before the court when this cause was argued was defective in not containing all the papers referred to in the reports produced; and in pursuance of an agreement that these might be supplied, application was made to the Treasury Department for them, but it appears by the reply that they are on the files of the Senate.

In consideration of the circumstances under which the settlement now attempted to be set up was made—that it was the act of the Comptroller alone; that the Auditor was not suffered to exercise his judgment in the examination of the account in his office; that the Secretary of the Treasury has repudiated the settlement, and that it has not been placed on record in the office of the Register of the Treasury, whose duty it is to keep accounts of all debts due to and from the United States, but, on the contrary, the accounts kept in that office represent the petitioner as indebted to the United States—the counsel for the United States feels constrained to ask that the objections made by the Treasury Department to the claim may be inquired into, and be considered as part of the defence now made to this suit.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

December 5, 1859.

THOMAS R. GEDNEY *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the court.

This is a claim for the sum of $1,655 10, for moneys alleged by the claimant to have been paid out for the government by him as disbursing agent of the Coast Survey. The payments above alluded to are charged to have been made from 1841 to 1844.

The following are the facts connected with this claim:

The claimant was disbursing agent of the Coast Survey before and during said period and afterwards.

On the 8th of March, 1847, he presented his account at the treasury for settlement as late disbursing officer of said survey.

The vouchers accompanying his charges against the government amounted to $3,008 29
The amount of credits was 1,353 84

Balance claimed as due from the United States 1,654 45

On the 19th of March, 1847, the First Auditor of the Treasury stated the account.

He charged the claimant with a balance due from him, as per report No. 94860, of $2,439 27
He credited the account with the amount disbursed, as per abstract and vouchers $1,858 44
Voucher No. 20, Charles Chauncey, theretofore suspended, then allowed 187 63
Balance due the United States 393 20
——— 2,439 27

On the 21st June, 1847, the First Comptroller revised the above report of the First Auditor, and stated the account as follows:

He charged Captain Gedney (as the First Auditor had done) with the balance, as per report No. 94860 ..... $2,439 27
And credited him with disbursements, per abstract and vouchers marked A $1,231 14
No 20 ..... 187 63
Commission on $40,820, at 2½ per cent 1,020 50
——— 2,439 27

He (the Comptroller) certified his proceedings as follows:

"TREASURY DEPARTMENT,
Comptroller's Office, June 21, 1847.

"Admitted and certified as corrected.

"J. W. McCULLOH."

The vouchers marked A, as above, are the following:

No. 4	$138 00
No. 5	218 17
No. 8	127 00
No. 10	548 72
No. 14	199 25
	1,231 14

On the same day (June 21, 1847) on which the Comptroller certified the account as above, he wrote to Captain Gedney informing him of the above settlement, and saying it had been made without having given him credit for his disbursements mentioned in the twelve vouchers, amounting to $1,655 10, returned to him in this letter, with an abstract of the same, marked B.

The said abstract, marked B, is as follows:

No. 1.	W. Fischer, for stationery	$113 12
No. 2.	W. W. Bridges, quarters	84 29
No. 3.	J. Jones, quarters	208 00
No. 6.	P. W. Schenck, scantling, &c	66 00
No. 7.	R. Brown, pilotage	130 00
No. 9.	John H. Simpson, for pilotage	80 00
No. 10.	Nathaniel Thorne, services, &c	799 80
No. 11.	J. Jones, for transportation	70 00
No. 12.	W. Osborn, freight	2 45
No. 13.	B. & O. Railroad Co., transportation	3 44
No. 15.	John Doyle, transportation	95 00
No. 35.	W. A. Wheedon, lodging, &c	3 00
		1,655 10

On the 30th of June, 1847, the First Auditor certified the above sum of $1,655 10 to be due to Captain Gedney, late disbursing officer of the Coast Survey, &c. And on the same day the First Comptroller certified as follows:

"I admit and certify the above balance this 30th day of June, 1847, to be paid on or after 1st July 1847.

"J. W. McCULLOH, *Comptroller.*"

It appears that the Secretary of the Treasury was not satisfied with said allowance to Captain Gedney of $1,655 10, and accordingly referred the matter to Mr. Bache, the Superintendent of the Coast Survey, to whom the vouchers were sent. In October, 1847, Mr. Bache made his report to the Secretary of the Treasury. On the 31st of October, 1848, complaint was made, on the part of Captain Gedney, to the President of the United States, on account of the delay in the settlement of the claim, which complaint was referred by the President to the Secretary of the Treasury. On this reference by the President, the Secretary of the Treasury made the following indorsement:

'The opinion of the Superintendent of the Coast Survey, as well as my own, is decidedly against this claim. The action of the Comptroller seems to be requested by the parties with a view to apply to Congress.

"R. J. WALKER, *Secretary Treasury.*

"To First Comptroller."

On the 3d of July, 1849, the then First Comptroller, Mr. Whittlesey, at the request of the claimant's attorney, examined into the nature of said claim, and came to the conclusion that the claimant was entitled to the said sum of $1,655 10, certified as above by the accounting officers. Mr. Whittlesey places his opinion on the ground that the decision of said Auditor and Comptroller was final and conclusive, saying that the Secretary of the Treasury had no control over those officers, and that his decision in this case rejecting the claim was illegal and void.—(See Mr. Whittlesey's report.)

In September, 1849, Mr. Meredith, then Secretary of the Treasury, to whom said report of Mr. Whittlesey was made, declined acting in the case, because Mr. Walker had rejected the claim; and in May, 1851, Mr. Meredith's successor, Mr. Corwin, also refused to act, on the ground that, for anything shown, the decisions of Mr. Walker and Mr. Meredith were conclusive against opening up the case.

The claimant has now brought his case before this court, and we must examine and decide it on its merits. The decision of the accounting officers in favor of the claim is not, nor is that of the Secretary of the Treasury against it, conclusive in this court.

In the foregoing settlement made by the First Comptroller on the 21st of June, 1847, he credits Captain Gedney with the sum of $1,020 50 for commission on disbursements. That credit is objected to in Mr. Bache's report to Mr. Secretary Walker, dated October 26, 1847. Mr. Bache states, in that report, that during the time for which the claim is made a specific payment from the Coast Survey was allowed to Captain Gedney for his services. He states also that the allowance of the claim would be in contravention of the act of Congress of March 3, 1830. The language of the second section of that act is as follows: "That no allowance shall hereafter be made to any officer in the naval service of the United States for drawing bills, for receiving or disbursing money, or transacting any business for the government of the United States," &c.—(4 Stat. at Large, 757.) The report of Mr. Hein, in 1847, then the general disbursing agent of the Coast Survey, states that the disbursements on which said commission was charged were made from 1836 to 1843. During that period Captain Gedney was an officer in the naval service of the United States. That appears by the following communication:

"NAVY DEPARTMENT, *December* 2, 1859.

"SIR: The department informs you, in reply to your request of the 1st instant, that Thomas R. Gedney was an officer in the naval service of the United States during the period from January 1, 1836, to December 31, 1843. His position was a lieutenant from the first named date to the 8th September, 1841, when he was promoted to the rank of a commander. During the entire period, to wit, from the 1st January, 1836, to the 31st December, 1843, he was employed on the Coast Survey.

"I am, respectfully, your obedient servant,

"ISAAC TOUCEY.

"J. D. MCPHERSON, Esq.,
"*Deputy Solicitor, Washington, D. C.*"

Captain Gedney being such officer during said period, the said credit of $1,020 50 is in violation of said act of Congress, and must therefore be disallowed.

In the li t of vouchers, marked A, aforesaid is one designated in Mr. Hein's report, "No. 4, October 31, 1844, S. Richardson, for quarters, $138 00." Mr. Bache's objection to that credit is as follows: "The account of F. (S.) Richardson for quarters for Lieutenant Stembel in 1844 is inadmissible, as contrary to express regulations,

(Coast Survey Regulations, part 6, section 5.) When applied to by Captain Gedney, before the order was given to Lieutenant Stembel, I informed him that no such allowance could, by the regulations, be made. This account was accordingly rejected by the general disbursing agent of the Coast Survey on presentation.

We therefore consider that credit of $138 as not admissible.

There does not appear to be any substantial objection to any of the vouchers for the aforesaid sum of $1,655 10.

Deducting the said two sums of $1,020 50 and $138, which together amount to $1,158 50, from said $1,655 10, the balance left is $496 60.

We therefore give judgment in favor of the claimant for that balance of $496 60.

COURT OF CLAIMS.

December 6, 1859.

THOMAS R. GEDNEY *vs.* THE UNITED STATES.

On motion of James L. Edwards, administrator of Thomas R. Gedney, deceased, by his counsel, it is ordered that the death of the said Thomas R. Gedney be suggested on the record, and that this case be revived and hereafter proceed in the name of James L. Edwards, administrator of the said Thomas R. Gedney, deceased. And it is further ordered that the bill directed by the judgment of the court, rendered yesterday, be reported to Congress in the name of James L. Edwards, administrator of Thomas R. Gedney, deceased.

A true copy of record.

SAML. H. HUNTINGTON, *Chief Clerk.*

UNITED STATES OF AMERICA,

Washington County, District of Columbia, to wit:

To all to whom these presents shall come, greeting:

Know ye, that on the 13th day of February, in the year of our Lord 1858, letters of administration with the will annexed, of all and singular the goods, chattels and credits, which were of Thomas R. Gedney, late of the United States navy, deceased, was, by the orphans' court of Washington county aforesaid, granted and committed unto James L. Edwards, of the county of Washington, D. C., he having first entered into bond, with approved securities, for the faithful performance of the duties thereof.

Witness William F. Purcell, esq., judge of the orphans' court of
[L. S.] Washington county, District of Columbia, this 6th day of December, anno Domini 1859.

Test: ED. N. ROACH, *Register of Wills.*

Daniel Ratcliff to Register of Wills, Dr.

1859.—For certificate of administration on the estate of Thomas R. Gedney, deceased, $1.

Received payment.

ED. N. ROACH, *Register of Wills.*

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C.C. No. 245.

SARAH B. WEBBER, ADMINISTRATRIX OF J. A. WEBBER.

MARCH 1, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

SARAH B. WEBBER, Administratrix of JOHN A. WEBBER, *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Letters of administration, depositions, and other documentary evidence filed by claimant, transmitted to the Senate.
3. Evidence filed on the part of the government, transmitted to the Senate.
4. Claimant's brief.
5. United States Solicitor's brief.
6. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S] seal of said court, at Washington, this first day of March, A. D. 1860.

SAM'L H. HUNTINGTON.
Chief Clerk of Court of Claims.

To the honorable the Justices of the Court of Claims:

The petition of Sarah B. Webber, of Watertown, in the county of Middlesex, and Commonwealth of Massachusetts, widow, respectfully represents:

That she is the widow of John A. Webber, late United States military storekeeper at the United States arsenal, in Watertown, deceased, intestate.

That the said John A. Webber died at Watertown aforesaid, upon the fifth day of May, in the year eighteen hundred and fifty-five, in the service of the United States, as military storekeeper aforesaid, and

that she, the said petitioner, upon the twelfth day of June, in the year aforesaid, was duly appointed by the honorable the probate court for the county aforesaid, administratrix of the goods and estate of the said John A. Webber.

And your petitioner further represents that prior to the thirty-first day of July, which was in the year eighteen hundred and forty-six, the government of the United States had caused to be constructed under the direction of the ordnance corps of the United States, a certain large gun or cannon, called a twelve-inch Columbiad; that the great weight of said gun required a large force to manœuvre it; that the severe shock of its discharge rendered necessary the construction of a carriage which should be sufficiently strong to resist such shock without bending or breaking; that the recoil of said gun was so great after its discharge as to require, in the carriages then commonly used, a chassis of inconvenient length, and that the force of the explosion deranged both the vertical and horizontal field of fire so that the accuracy of aim was very seriously impaired.

Your petitioner further represents that the said twelve-inch columbiad gun, for the want of a suitable carriage, if not wholly useless as a military weapon, was very much impaired in its efficiency, as well by the difficulties herein before enumerated as by others. That various contrivances for the purpose of removing said difficulties had been suggested by different persons connected, with said department, but without success, and that until the construction of the carriage hereinafter described, no carriage proper for so large a gun had been devised.

Your petitioner further represents that the said John A. Webber applied for and received from Col. George Bomford, late inspector of the United States ordnance corps, permission to construct a carriage for said gun, and, in pursuance of the permission accorded, constructed a carriage for said gun upon the application of certain scientific principles wholly of his own invention. And your petitioner doth aver that the following is a correct description of said carriage and of the differences between its construction and that of the common barbette carriages; that is to say:

The general form of both of said carriages is the same. In the common barbette carriage the upper carriage moves on the tongue of the chassis, in a groove cut into the rear transom of the upper carriage, which is prevented from lateral motion by two stout and heavy iron rolls with flanges running on the outside of the chassis rails, and having a play of two-tenths of an inch.

The difficulties attending this construction are, that when the chassis rails have shrunk, the play of the wheels becomes so great that the lateral motion of the upper carriage deranges the horizontal line of fire. If the chassis is made of seasoned timber, and the flanges of the rolls made to fit close to the outer surface of the rails, when the said rails swell in wet weather, the carriage cannot be worked.

In Webber's carriage, the tongue of the chassis and the iron rolls are dispensed with. Instead of them, the front and rear transoms of the upper carraige are made to descend two or three inches below the top of the chassis rails, while the ends of each transom are guarded

with friction plates and with plates on the inside of the rails; when, therefore, the chassis rails shrink or swell, they can be brought back to their original position by means of the nuts and bolts which support and keep the carriage together.

In the common barbette carriage, the friction of the rear transom of the upper carriage over the tongue of the chassis, is used to diminish the recoil of the gun, but the same friction operates to increase the resistance in running the gun to battery, and is not sufficient to diminish the recoil so much as materially to shorten the length of the chassis.

Webber's carriage has four truck wheels placed on axle-trees, having eccentric arms, and capable of being thrown in gear or out of gear at pleasure. There are plates of iron upon the upper surface of the chassis rails, and on the under surface of the gun carriage. When the eccentric axles are put *out of gear*, by means of iron bars made for the purpose, the truck wheels are raised so as to clear the chassis, and allow the weight of the gun and upper carriage to rest upon the iron friction plates of the chassis. When the gun is fired, it recoils by sliding over the chassis rails, the friction upon which diminishes the recoil. In moving the gun to battery, the eccentrics are put down, and thus raise the carriage from the chassis, causing the whole weight of the gun and carriage to rest upon the four truck wheels, by means of which contrivance the heaviest gun can be moved to battery with ease by two men.

In the common barbette carriage, the bolster is placed under the front transom of the chassis, and the diameter of the bolster is much less than the width between the chassis rails upon the inside. Neither the tongue of the chassis, nor the chassis rails, derive any support from the bolster, and they are therefore sprung or bent by every discharge, so as to derange the vertical field of fire, and frequently break to pieces.

In Webber's carriage, the bolster is placed under the middle transom, its diameter is sufficient to give a bearing or support to the rails where the greatest shock is received in firing at a high elevation, and, in addition to a plate, it is furnished with an outside iron circle on which the rails sustained by the middle transom traverse.

And your petitioner avers, that the said John A. Webber was the sole and original inventor of the following useful improvements in barbette carraiges, that the said improvements were patentable, and that he, the said John A. Webber, might have secured the same by letters patent, had he chosen to apply therefor; that is to say:

1. Causing the resistance to any lateral motion of the upper carriage to be made between and within the chassis rails, by bringing down the front and rear transoms below the level of the upper surface of the chassis rails, and guarding said rails, and the ends of said transoms, with friction plates, as hereinbefore described, instead of causing the said resistance to be made outside of said chassis rails, as heretofore practiced, and hereinbefore described; by means of which improvement, the shrinkage or swelling of the transoms and chassis rails, can be remedied with economy, facility, and speed, and variation in the horizontal field of fire always prevented.

2. The use of four truck-wheels, fitted with eccentric arms to the upper carriage, so that the friction which operates to diminish the recoil, can be applied and removed at pleasure, and so that, while the recoil is diminished and the chassis reduced in length, the force employed to produce these effects, does not impede the motion of the gun in the opposite direction. The said Webber could not have claimed the use of wheels with eccentric arms, to produce friction and diminish the recoil in the abstract, but he could have claimed the use of such wheels in combination with the rails of the chassis and the said friction plates, altogether producing the effect aforesaid, and the peculiar mode in which said wheels are used in said carriage, as hereinbefore described, and made to produce the effect aforesaid, in diminishing the recoil, without impeding motion in the opposite direction.

3. Supporting and giving a bearing to the rails of the chassis, by means of the peculiar location and construction of the bolster, as hereinbefore set forth, by means of which, the vertical field of fire is secured from derangement.

4. The combination, in the same gun carriage, of the three improvements next hereinbefore set forth and described.

And your petitioner further represents, that the said John A. Webber was the sole and exclusive original inventor of all the various improvements in gun carriages hereinbefore set forth, and of their combination in the aforesaid carriage, for a twelve-inch columbiad gun; that he well knew he was such inventor, and that he was entitled to, and might have obtained, a patent therefor; but your petitioner doth inform your honors, that the said John A. Wbeber did not apply for such patent solely because he labored under a mistaken belief that it was his duty, as a person employed by the United States, to devote all his energy and all his ability, of whatever kind, to the benefit of its service, although your petitioner doth insist that it is not, and never was, a part of the duty of a military storekeeper to invent machines of any description for the benefit of government, and that, by reason of such mistaken idea, the said John A Webber cannot be deemed to have intended to abandon, and that he did not in fact abandon, to the public, the aforesaid patentable inventions or improvements in gun carriages.

And your petitioner further represents, that after the said carriage was invented, it was thoroughly tested under the supervision of the aforesaid Ordnance department, and found to answer all the purposes for which it was constructed. That the said carriage, by a few trivial and unimportant alterations, which do not affect in anywise the principle of the said carriage, or of any part thereof, was adapted to the use of guns of smaller calibre, to wit, to the use of eight and ten inch columbiads, and that for all guns of heavy calibre it is the best carriage now in use, and is familiarly known as, and called by the name of, "*Webber's Carriage.*" That the number of said carriages made since the year eighteen hundred and forty-six, by the United States, is one hundred and eighteen. That there are required, for all the forts in the United States, not fewer than one thousand two hundred and twenty carriages, all of which, it is now intended, shall be made of the present model, that is to say, shall be the Webber car-

riage; and the same will be made of the said model, unless by new improvements, none of which have yet been produced, the said model shall be changed.

And your petitioner further represents, that the cost of constructing one of said gun carriages, at an arsenal of the United States, is about the sum of six hundred dollars; and that, if the said John A. Webber had obtained a patent for the same, and sold the same to the United States, the value of the invention to the United States would have entitled him to demand the sum of fifty dollars for each carriage constructed for its use, according to the rate usually charged and received by patentees for the use of their inventions.

And your petitioner further represents, that the said John A. Webber left four children only, all of whom are now alive, to wit, Harriet H. Webber, Franklin P. Webber, Charles H. Webber, and Mary C. Webber, of whom only Harriet H. and Charles H. are of the full age of twenty-one years; and that your petitioner presented to the honorable the Senate of the United States, at its recent session, a petition praying that Congress would be pleased to make to her, or to her four children aforesaid, such grant, in view of the premises, as to Congress might appear just, which said petition was referred to the Committee of Claims in the Senate, on the twenty-third day of April last, and on the thirteenth day of May last, the said committee were discharged from the further consideration of said petition, and it was referred, with the papers, to this honorable court.

All of which is respectfully submitted by

SARAH B. WEBBER.

COMMONWEALTH OF MASSACHUSETTS.

On this 26th day of November, A. D. 1856, personally appeared Sarah B. Webber, the petitioner before named, before me, a commissioner of the court of claims within and for the Commonwealth of Massachusetts, and made oath that the facts stated in the foregoing petition were true to the best of her knowledge and belief.

D. S. GILCHRIST, *Commissioner.*

IN THE COURT OF CLAIMS.

No. 790.

SARAH B. WEBBER, Administratrator of JOHN A. WEBBER, *vs.* THE UNITED STATES.

CLAIMANT'S BRIEF.

Introductory Statement.

1. This case was referred to the court of claims by an order of the Senate, passed April 23, 1856. (Petition, Rec., p. 6.)

2. As to cases thus brought before this tribunal, the court have said:

"We are authorized to examine any case referred to us by either House of Congress, to report our opinion upon the law, and to state the facts as we find them to be proved; but in relation to matters which address themselves particularly to the sound discretion and liberality of Congress, we do not feel ourselves authorized to recommend any legislation." (Case of James M. Lindsey, 1, Rep. C. of C., No. 10, p. 16.)

3. In the case of Lindsey, the court decided that the claimant had no "legal cause of action against the United States," but that there were some considerations of an equitable character, which may properly be considered by Congress." (Id., p. 17.) A bill was accordingly reported "for the relief of the petitioner, and for such action as may be deemed proper." (Id.)

4. The preliminary objection, which the Solicitor had a right to raise under the sixth rule of the court, was waived by the following agreement in writing, which is on file in the case, viz:

"*In the Court of Claims.*—On petition of Sarah Webber, I agree that the testimony may be taken by claimant, without notice, reserving the right to cross-examine, if I shall think proper to do so after the depositions shall be returned.

"M. BLAIR, *Sol. U. S.*"

5. The petitioner does not pretend that she has a legal cause of action against the United States. Whether she has an equitable claim will appear from the facts. Her equitable claim is, however, as clear as that of the petitioner in the case above cited. She asks of the court nothing more than was granted to Mr. Lindsey; and as she understands his case, she is entitled at least to a report of the facts proved.

6. That John A. Webber is deceased; that at that time of his decease, he was the military storekeeper in the United States arsenal at Watertown; that Mrs. Sarah B. Webber, the petitioner, is his widow and administratrix; that she has a family of four children, two of them young ladies; that her income is very small, are facts entirely proved by the deposition of her brother, Mr. Charles Hickling, and will not probably be denied. (Dep. of Hickling, ans. to interrogatories 3, 4, 5, 6, 7, 8, 9, 10, Record, p. 8.)

7. The petition alleges, in substance:

I. That in 1846, Captain John A. Webber invented a carriage for a 12-inch columbiad, familiarly called "Webber's carriage." Petition, Record, p. 4.

II. That this carriage was patentable in four particulars, specifically described in the petition. (Petition, Record, p. 5.)

III. That the reason why Captain Webber did not apply for a patent, was "solely because he labored under a mistaken belief that it was his duty as a person employed by the United States to devote all his energy and all his ability of whatever kind to the benefit of the service." (Petition, Record, pp. 5, 6.)

IV. That the carriage thus invented by Captain Webber for the 12-inch columbiad was by means of certain alterations in nowise affect-

ing its *principles*, adapted to columbiads of 8 and 10-inch calibre. (Petition, Record, p. 6.)

V. That the said carriage is perfectly adapted to its purpose, and has been extensively used by the United States since 1846. (Petition, Record, p. 6.)

VI. That if Captain Webber had obtained a patent for the carriage, and sold the same to the United States, the value of the invention to the United States would have entitled him to demand the sum of fifty dollars for each carriage constructed for its use, according to the rate usually charged and received by patentees for the use of their inventions. (Petition, Record, p. 6.)

These allegations the claimant submits are fully sustained by the evidence and the law of the case, and present a claim, if not in law, at least in equity, to a renumeration for benefits conferred upon the country.

I.—*In* 1846, *Captain John A. Webber invented a carriage for a* 12-*inch columbiad, familiarly called "Webber carriage."*

I. Captain Webber and several other persons of practicable and scientific acquirements were in 1846 endeavoring to contrive a carriage for a 12-inch columbiad. (Lester's dep., ans. to int. 15, Rec., p. 24.)

2. Captain Webber was himself experimenting for such a carriage. (Dep. of Brown, ans. to int. 7, Rec., p. 27.)

3. At the mechanics' fair in Boston, in 1847, Captain Webber, in his own name, exhibited the model of a barbette carriage for a 12-inch columbiad. (Dep. of Bates, Edhibit B., Rec. p. 14.)

4. For this carriage he received the highest award of the association, viz: a gold medal. (Dep. of Bates, ans. to int. 13, 14, 15, Rec., p. 12; dep. of Bates, Exibit B, Rec. p. 16, pl. 5; dep. of Hickling, ans. to int. 15, Rec. p. 9, dep. of Oliver, ans. to int. 8, Rec., p. 20.)

5. The gold medal was awarded only in "*particular cases for some very valuable invention or improvement.*" (Dep. of Bates, Exhibit A. Rec. p. 12.)

6. This medal was *unanimously* awarded to Captain Webber by the committee of judges, upon the express ground of the value of the carriage as an invention or improvement.

"A silver medal was at first voted, and I proposed a gold medal, in compliance with the general printed instructions of the executive committee of the accociation, upon the ground that the crrriage comprised features *evidently novel as well as useful.*" (Oliver's dep., ans. to int. 8, Rec., p. 20; Bate's dep., Exhibit B, Rec., p. 16, pl. 5.)

7. Colonel Bomford, then head of the ordnance corps, and Major William Wade, of the United States army, both well known as possessing scientific attainments of the highest character, were members of the the committee which awarded the medal. Colonel Bomford's attention was particularly drawn to the report, and an alteration in a particular personal to himself was made in it at his suggestion. (Oliver's dep., ans. to int. 9, 10, 11, Rec., p. 20.)

[NOTE.—Neither Colonel Bomford nor Major Wade, both distin-

guished officers of the army, both men of science, both gentlemen of the purest sense of personal honor, both seeking to invent a carriage for this very gun, would not have sanctioned a public declaration under their names that Captain Webber invented this carriage, and awarded to him a prize for it, which any man may well be proud to receive, unless they had been perfectly satisfied from their own knowledge that Captain Webber was the inventor. This evidence, it is submitted, is entirely conclusive that Captain Webber was the sole and exclusive inventor of the carriage, as alleged in the petition.]

8. Mr. Lester, engaged about the same time in the search after a proper carriage, himself a practical mechanic and inventor, testifies to the same effect:

"The carriage, as it now exists, was, in my opinion, invented by Captain John A. Webber." (Lester's dep., ans. to int. 14, Rec., p. 23.)

"The combination of the various parts of this carriage was undoubtedly the invention of Captain Webber. No carriage had previously combined them for any useful purpose." (Id., id., Rec., p. 25.)

9 Such was the opinion of Major Harding, commander of the arsenal at Watertown in 1853:

"He has devoted a great deal of attention to this description of carriage; and if there is any merit in the thing, (of which I believe there is much,) *he is entitled to the credit.*" (Major Harding's letter, Rec., p. 46.)

10. Such is the statement of Brown, the mechanic, who made the patterns for the original carriage, and who constructed all the carriages subsequently manufactured at the arsenal in Watertown. (Brown's dep., ans. to int. 6, 7, 8 and 9, Rec. p. 27.)

Against this evidence that Captain Webber invented this carriage the government has produced nothing.

II.—*This carriage was patentable in four particulars, specifically described in the petition.*

1. These particulars are in general terms as follows:

A. The mode of guiding the upper carriage. (Petition, Rec., p. 5, No. 1)

B. The mode of diminishing the recoil without impeding the motion in the opposite direction. (Id., id., id., No. 2)

C. The mode of supporting and giving a bearing to the rails of the chassis. (Id., id., id., No. 3.)

D. The combination in the same carriage of the three improvements above named. (Id., id., id., p. 6.)

2. These improvements are correctly and accurately described in the petition. (Lester's dep., ans. to int. 13, Rec., p. 22. Brown's dep., ans. to int. 24, 25, and 26, Rec., p. 30.)

3. The opinion of the experts:

a. Samuel Cooper: "From the year 1848 to 1852 I was in the examining corps of the Patent Office as principal examiner. I investigated all claims to letters patent for improvements in fire-arms, gun-carriages, &c., and it was upon my report that the patents were granted or refused therefor." (Cooper's dep., ans. to int. 4, Rec., p. 31.)

"I have examined the same" (*i. e.*, Webber's carriage) "within the last three months, and am familiar with the principles of its construction and the mode of its operation." (Id., ans. to int. 5, Rec., p. 32. See, also, id., ans. to int. 6, id.)

This highly competent expert says of the carriage:

"There are several devices in the Webber carriage, each of which I consider patentable: 1st. The method of guiding the carriage upon the chassis. 2d. The method of supporting the chassis. 3d. The method of diminishing the recoil and of facilitating the running of the gun into battery. I am also of opinion that were these elements all old, Webber would still be entitled to a patent for his carriage so constructed as to enable him to embody in one all these desirable features. (Cooper's dep., ans. to int. 53, Rec., pp. 41 and 42.)

b. Ebenezer A. Lester:

i. This expert is a practical mechanic, and the inventor and patentee of several machines, particularly the *oscillating steam engine* and a nail machine. (Lester's dep., ans. to int., 4, 5, 6, and 7, Rec., pp. 21 and 22.)

ii. He has been particularly engaged in experimenting with ordnance. (Id., Rec. p. 26.)

iii. Very recently, before giving his deposition, he examined the model of the carriage, and compared it with the description in the petition. (Id., ans. to int. 12, Rec. p. 22.)

iv. Mr. Lester's opinion is the following: "The carriage, as it is used now (as I am informed) in the United States service, was, as a whole carriage, invented by Captain Webber, and, in my judgment, was patentable when he invented it, because the construction was novel, the combination new, and it *obtains satisfactory results not before obtained.*" (Lester's dep., ans. to int., 14, Rec., p. 25.)

4. The petitioner relies upon the following principles of law as—when applied to the facts proved—establishing the position that Webber's carriage was patentable in the four particulars above named.

a. An improvement in a machine is patentable if it produces "either the same effect in a cheaper or more expeditious manner, or an entirely new effect, or an effect that is in some material aspect superior to that produced by the old machine." (Curtis on Patents, s. 95, cites Whittemore *vs.* Cutter, 1 Gall., 478, 481; Brunton *vs.* Hawkes, 4 B. and A., 540.)

b. "Where a specific machine already exists, producing certain effects, if a mere addition is made to such machine to produce the same effects in a better manner, a patent cannot be taken for the whole machine, but for the improvement only." (Whittemore *vs.* Cutter, ub. sup.)

c. "If well known effects are produced by machinery in all its combinations entirely new, a patent may be obtained for the whole machine." (Id.)

d. "If the principles of the machine are new, either to produce a new or an old effect, the inventor may well entitle himself to the exclusive right to the whole machine." (Id. Barrett *vs.* Hall, 1 Mason, 447.)

e. "A combination, as the subject of a patent, is analogous to a

composition of matter, the former expression being usually applied to mechanical inventions as the latter is to chemical. It is sufficient, also, in this case that the combination is new, though the separate things combined may have been before in use and well known." (Philips on Patents, 114, cites Bovill *vs.* Moore, Dav. Pat. Cas., 361.)

f. "There may be a valid patent for a new combination of materials *previously in use* for the same purpose." (Hill *vs.* Thompson, 3 Mer., 622.)

g. "It is no objection to a manufacture that the articles of which it is composed were known and in use before the patent, provided the compound article which is the object of the invention is new." (Boulton *vs.* Bull, Dav. P. C., 199.)

h. "I suppose it will not now be disputed that a new combination of old materials, so as to produce a new effect, may be the subject of a patent." (Huddart *vs.* Grimshaw, id., 267; S. P., Cornish *vs.* Keine, 3 Bing., N. C., 570; S. P., Crane *vs.* Price, 4 M. and G., 580.)

5. The testimony as to the particulars wherein it is claimed that the Webber carriage is patentable.

A.—*The mode of guiding the upper carriage.*

1. "As the effects of the two methods are different, the one being entirely free from the defects of the other, the method of guiding the upper carriage is unquestionably different in principle from that adopted in the old carriage. (Cooper's dep., ans. to int. 18, Rec., p. 35.)

"2. Interrogatory 19. Whether or not, in Webber's carriage, any new and useful effect is produced by the method of guiding there used; if yea, what is it?

"Answer. The gun carriage is caused to run back at the instant of discharge in a line parallel with the axis of the chassis, *by which a far greater accuracy of aim is insured* than where the bearings are on the outside of the chassis rails, as in the old carriage." (Id. Rec., p. 35.)

3. "The effect is certainly produced in a *better and cheaper manner* in the Webber than in the old carriages." (Id., ans. to int. 20, id.)

4. "Principally," the mode of guiding in Webber's carriage "is better in this respect: that the Webber carriage is not allowed to wabble from side to side during the recoil, as is the case with the old carriage, whereby greater accuracy of aim is attained." (Id., ans, to int. 21, id.)

5. "Webber's device for guiding the carriage upon the chassis is essentially different from that employed upon the old carriages, as are also the *effects which result therefrom. The one creates a difficulty and introduces a most vital defect for which there is no remedy;* the other avoids the difficulty, and is entirely free from the defect. This difference is unquestionably essential and not formal. (Id., ans. to int. 22, id.)

6. "If we measure Webber's invention by the importance of its results, (a legitimate way of estimating any invention,) we must certainly say that it introduces a new feature or element into the construction of gun carriages." (Id., ans. to int. 23, id.)

7. "Unquestionably the improvement was patentable to the first inventor of it, as it was both new and useful." (Id., ans. to int. 24, id., p. 36.)

B.—*The mode of diminishing the recoil without impeding the motion in the opposite direction.*

1. "Without the Webber carriage the heavy guns now extensively employed would require chassis of inconvenient length and a larger number of men to manœuvre them. I am not sure I should characterize the effect produced as new. I would rather say the means employed were new, and the effect produced was useful." (Cooper's dep., ans. to int. 27, Rec., p. 37.)

2. "Understanding the 'effect' inquired of to be two-fold, viz: diminishing the recoil and facilitating the running of the gun to battery, I reply that this two-fold effect is undoubtedly produced in a manner both better and cheaper in the Webber than in the old carriage, and for these reasons: 1st. A longer and more expensive chassis and a greater width of terreplein is required for the old than for the Webber carriage, owing to the diminished recoil of the latter. 2d. The Webber carriage may be operated much more rapidly than the old carriage, owing to the fact that the friction of the carriage directly upon the chassis is taken off when the gun is run into battery. 3d. Owing to the last named fact the gun may be manœuvred by a less number of men where the Webber carriage is used." (Cooper's dep., ans. to int. 28, Rec., p. 37.)

[NOTE.—Six men only would be required to manœuvre the 12-inch columbiad, on this carriage, although the gun weighed 26,000 pounds. Dep. of Bates, Exhibit B. Rec. pp. 14, 15.]

3. "It is doubtful whether guns of large calibre can be operated upon the carriage and chassis of the old construction; with facility and safety, certainly they could not be; whereas they are operated with both facility and safety upon the Webber carriage and chassis." (Cooper's dep., ans. to int. 29, Rec. p. 37.)

4. Webber's device or mode of moving the upper carriage upon the chassis and diminishing the recoil is "*substantially different*" from the mode used in common barbette or other gun carriages. (Cooper's dep., int. 30 and ans., Rec., p. 37.)

5. "The new feature contained in this portion of Webber's carriage consists in this: that the carriage *moves out* bearing directly upon the chassis, and *runs in* upon rollers, the effect being a diminished recoil and increased facility for manœuvring.") Id., ans. to int. 31, id.)

6. Mr. Cooper's deposition, from int. 32 to int. 40, inclusive, relates merely to the improvement made by Capt. Webber upon the use of wheels with eccentric axles, as applied by Mr. Alger. The petition disclaims for Capt. Webber the use of these eccentric arms in the abstract, but claims only as his invention the peculiar mode in which they were beneficially applied in his carriage. (Petition, Rec., p. 5, pl. 2.)

C.—*The mode of supporting and giving a bearing to the rails of the chassis.*

1. "Several new and useful effects result from Webber's mode of supporting his chassis. As already stated, in the old carriage at the instant of discharge a heavy downward strain is brought upon the centre of the chassis, which, being unsupported, is sprung down to such a degree as to be much weakened shattered and broken. Chassis of this character may be seen at Fort Washington, on the Potomac river, that have been rendered unsafe and almost useless by a few discharges from 24-lb guns. A more serious difficulty than the above, however, arises from the construction of chassis. When the chassis is thrown down, as the top carriage commences to recoil, the muzzle of the gun is thrown up, and as this takes place before the ball leaves the gun, this materially interferes with the correctness of aim. In the Webber carriage neither of these difficulties occur. The chassis being supported at a point immediately beneath the tail of the carriage, does not spring down when the gun is discharged, its rails are not weakened or broken, and a much more accurate aim is attained. *This I consider to be a very useful effect, and a great improvement upon the old carriage.* (Cooper's dep., ans. to int. 43, Rec., p. 40.)

2. "The above mentioned useful effect, viz: the improvement in the aim, is certainly produced in a much better manner in the Webber than in any carriage which preceded it." (Id., ans. to int. 44, Rec., p. 40.)

3. The mode of support used in Webber's carriage is better than the mode used in common barbette or other gun carriages, "for the reasons already explained. The chassis is not bent or broken, and a far superior aim is attainable." (Cooper's dep., int. 45 and ans. Rec., p. 40.)

4. "Webber's mode of giving support to the chassis was patentable, as it was both 'new' and 'useful,' and produced a new and useful result." (Id. ans. to int. 49, Rec., p. 41.)

5. The mode of supporting the chassis contains a new feature or element. (Id., ans. to int. 50, id.)

6. It produces a new and useful effect. (Id., ans. to int. 51, 52, Rec., p. 41.)

D.—*The combination in the same carriage of the three improvements above named.*

1. Cooper's dep., ans. to int. 53, Rec., pp. 41, 42, as quoted herein. (Ante, pp. 9, 10.)

"The new and useful effects produced by this combination, may be said to be the hitting of the bull's eye. The one device adjusts the fire in the horizontal field, the other in the vertical field; the intersection of the two passes through the centre of the bull's eye. To adjust in either one or the other field, would not accomplish the end to be attained." (Id., ans. to int. 54, Rec.,p. 42.)

3. "Whether or not said combination, assuming it to have been first made by said Webber, was *per se* patentable improvement upon other gun carriages; if yea, state why?"

"It was for the reasons above stated." (Id., int. 55 and ans., id., p. 42.)

[NOTE.—The question upon this part of the case is the same as it would have been before the Commissioner of Patents if Captain Webber had applied for a patent in 1846. No better evidence that his improvements were patentable can be offered than the testimony of Mr. Cooper, who was a principal examiner in the Patent Office, and "investigated all claims to letters patent for improvements in fire-arms, gun carriages," &c., (Rec. p. 31,) unless it be that of the present examiner. His testimony it would be improper to ask for, and impracticable to obtain.

The conclusion, then, which the petitioner would draw from the foregoing evidence, is, that the court should receive it as conclusive upon the point to which it is adduced.

III.—*The reason why Captain Webber did not apply for a patent was, solely because he labored under a mistaken belief that it was his duty, as a person employed by the United States, to devote all his his energy and all his ability, of whatever kind, to the benefit of the service.*

1. "Several years before his death, I knew that he had invented a gun carriage, about which I often conversed with him. It was adapted for the twelve-inch columbiad, and I have seen the gun carriage in process of manufacture at Watertown. *I repeatedly urged him to procure a patent upon it for his own benefit.* His reply was, that HE WAS AN OFFICER OF THE UNITED STATES GOVERNMENT, AND IN ITS PAY, AND HE DECLINED FOR THAT REASON TO TAKE OUT A PATENT." (Hickling's dep., ans. to int. 11, Rec., p. 9.)

[NOTE.—It is submitted that if any answer is required, the above statement is a perfect answer to the fact mentioned by Colonel Craig in his letter of June 4, 1856, (Record, p. 48,) viz: that there can be found no "*record* evidence to show that Mr. Webber was the inventor, or ever claimed the invention, of the columbiad carriage as now adopted for government use." Captain Webber was contented with doing what he deemed his duty, and did not seek to make a parade about it, or to claim credit where he might not have obtained it.]

3. That Captain Webber's objection to procuring a patent was founded on a mistaken punctilio, although it was very creditable to him, will appear from the well known practice of other officers in similar cases.

In 1836 the United States paid $20,000 to William H. Bell, then captain of ordnance, for his interest in two patent rights—one called a machine for elevating cannon, and the other called a traverse board for pointing cannon. (5 U. S. Stat. at Large, 126.)

IV.—*The carriage thus invented by Captain Webber for the* 12-*inch columbiad was by means of anterior alterations, in nowise affecting its principles, adapted to columbiads of* 8 *and* 10-*inch calibre.*

1. "Whether or not has said carriage since been adapted for the use of other ordnance than that for which it was first constructed; if yea, to what other ordnance has it thus been adapted?"

Answer. It has to 8 and 10-inch columbiads. (Brown's dep., int. 14 and ans., Rec., p. 28.)

2. "There was no alteration except in size and the omission of an endless chain to be used in moving the gun into battery, which Captain Webber told me would not be necessary for 8 and 10-inch guns." (Id., ans. to int. 15, Rec,, p. 29.)

3. "Carriages after Webber's plan have been made in the U. S. arsenal at Watertown for one 12-inch columbiad, thirty-four 10-inch columbiads, and seventy-two 8-inch columbiads. (Id., ans. to int. 20, Rec., p. 29.)

V.—*The invention of Captain Webber is one of high scientific merit, and the carriage is of much practical value to the United States.*

1. "Webber's carriage I saw tested several times under direction of Colonel Bomford, Major Wade, and Mr. Alger, and it answered all its purposes to their satisfaction perfectly well. I understand and believe it has been found, by repeated trials before the same gentlemen, to be all which is desired. No carriage before this of Webber's succeeded in obviating all the difficulties experienced in carriages for heavy ordnance. It is perfectly capable of application to 8 and 10-inch columbiads." (Lester's dep., ans. to int. 14, Rec., p. 25.)

2. "It can be used, and, I think, to better advantage than the carriages now constructed, as it is a more accurate and a more serviceable carriage." (Brown's dep., ans. to int. 16, Rec., p. 29.)

3. "It is a more serviceable carriage, and can be manœuvred with fewer men. I have no doubt that it would outwear two of the ordinary carriages." (Id., ans. to int. 18, id.)

4. "In my opinion all the principal requirements of a perfect gun carriage are found to a remarkable degree in Webber's carriage and chassis." * * "They have been attained by following out the most correct and scientific principles; and that the carriage and chassis, taken as a whole, is *an invention of the highest merit, and an improvement of great value.*" (Cooper's dep., ans. to int. 15, Rec., p. 45.)

5. "These two features, viz: the method of supporting the chassis and the method of guiding the carriage, I consider to be *improvements of the very first order and importance.* They are based upon the most correct scientific principles, and cannot fail to produce the results above named." (Id., ans. to int. 15, id.)

6. "I would consider the Webber carriage cheaper than the old carriage *did it cost treble the amount to build it.*" (Cooper's dep., ans. to int. 57, Rec., p. 45.)

7. The government has shown its opinion of the value of this carriage by constructing 190 of them, at an average cost of $550 each, equal to $104,500. (Colonel Craig's letter, January 11, 1858, Rec. p. 45.)

8. Up to June 4, 1856, 118 had been constructed. (Colonel Craig's letter, June 4, 1856, Rec., p. 48.)

Up to January 11, 1858, 190 had been constructed.

That is to say, 72 carriages were constructed between Jun 4, 1856, and January 11, 1858—nearly the whole during the pending of this suit.

9. "The carriage then made for the 12-inch columbiad *was found to be superior to the model then in use for that kind of gun,* and it was subsequently determined to adopt the same kind of carriage for the 10 and 8-inch columbiads to be mounted in barbette." (Colonel Craig's letter, June, 1856, Rec., p. 48.)

[NOTE.—The foregoing testimony proves that Captain Webber's invention is valuable to the United States in two aspects, viz:

1st. Because it is the most effective in use, as regards the *facility of manœuvring* and accuracy of aim. And it is to be presumed that the government would not have failed to acquire a carriage of this description at any price.

2d. Because it is a *cheaper* carriage than any other known. First, from the fact of its greater durability, and second, from the fact that fewer men are required to manœuvre heavy ordnance when mounted on this carriage than when mounted on a carriage of the old form.]

10. The conclusion as to the value to the United States of Webber's carriage ought not in anywise to be affected by the following statement in Colonel Craig's letter of January 11, 1858, viz:

"I may add that it is intended to adopt a carriage for columbiads of an entirely different pattern, and that few, if any more, of the present kind will be made." (Rec., p. 45.)

1. Because the statement is gratuitous, and not responsive to any question asked.

2. Because the petitioner, in moving the court for a call upon the Ordnance department, moved that the following question should be asked of it, viz:

"How many such carriages will be required for all the forts of the United States, *and whether they will be made after Webber's model?*"

This question—on file in the case, but not printed—was predicated upon the following statement contained in Colonel Craig's letter of June 4, 1856, viz:

"The total number required for all the forts is 1,338. Those yet to be made are now intended to be of the present model, but they may be modified, or entirely changed by new improvements." (Record, p. 48.)

This question was disallowed by the court, and not put; upon the ground that it was not "probably in the power of the government to tell what will be done hereafter."

The petitioner, therefore, submits that this statement is not evidence, and ought not to be considered by the court.

3. Because against the well-considered and explicit testimony of three practical experts, two of them distinguished for scientific acquirements, as to the very great practical value of Webber's carriage, this vague and uncalled-for statement is not entitled to any weight as evidence.

4. Because it may be perfectly true that, although the new carriage, mentioned by Colonel Craig, is of an "*entirely different pattern*" from Webber's carriage, yet the patentable features of the latter are still preserved and applied to the new carriage. No conclusion, therefore, in the face of the evidence, can be fairly made that Web-

ber's principles of construction, as well as the mere mode, shape, or *pattern*, in which they are embodied, are also to be abandoned.

5. The question whether the new carriage is different in its principles from Webber's, involves a question of "*substantial* identity." Concerning such the government have offered no evidence at all. It is entirely uncertain what is intended by a "*different pattern.*"

6. The question is the same as it would be upon a suit for infringement, although there can be no infringement here because there is no patent. If the "entirely different pattern" embraces Webber's mode of guiding, or his application of eccentric axles, or his mode of supporting the chassis, than the new pattern is *pro tanto* substantially the same as Webber's, and the United States will still continue to use Webber's invention, whatever may be the other peculiarities of the new pattern, as the following citations will show:

a. "The first question for consideration is, whether the machines used by the defendant are *substantially in their principles and mode of operation* like the plaintiff's machines. If so, it is an infringement of the plaintiff's patent to use them, unless some other matters offered in the defence are proved." (Odwine *vs.* Winkley, 2 Gall., 51–3.)

b. "If from the whole evidence the jury is satisfied that these differences are *mere changes* of form without any alteration in real structure, then the plaintiff is entitled to recover." (Lowell *vs.* Lewis, 1 Mason, 191.)

c. We think it may be safely laid down as a general rule, that when the machines are substantially the same, and operate in the same manner, to produce the same result they must be in principle the same." (Gray *vs.* James, Peters C. C. R., 394, 397.)

d. "Clegg's patent was the application of a law of natural science, respecting the motion of fluids and solids, and the alternate filling and discharging of a vessel of gas by means of that application; the object being to obtain an instrument for measuring the quantity of gas supplied to a consumer. The scientific witnesses said that the moment a practical scientific man had got that principle he could multiply without end the forms in which it could be made to operate. The instrument used by the defendant was different in form and construction from that used by the patentee; *but the application of the principle, by means of a varied apparatus, was the same in both;* and it was held an infringement." (Curtis on patents, s. 231, cited in Jupe *vs.* Pratt, Webs. Pat. Cas., 146.)

The conclusion which the petitioner draws from the foregoing propositions of law and fact relating to Col. Craig's statement that "it is intended to adopt a carriage for columbiads of an *entirely different pattern*, and that few if any more of the present kind will be made," (Record, p. 45,) is the following, viz:

i. That as there is no evidence in anywise even tending to show that the new carriage differs from Webber's carriage in any other respect than its *mere pattern;*

ii. And as a difference in pattern is entirely consistent with the use in the new carriage of each of Webber's improvements;

iii. And as these improvements are clearly shown to be of great and permanent value and importance in their peculiar principles;

iv. It is not to be assumed that in adopting the new pattern the United States will discontinue the use of these improvements;

v. And therefore that the petitioner's case stands exactly where it would stand if this uncalled for statement had not been made.

7. It is quite uncertain from Col. Craig's letter whether even the "*pattern*" in which Webber embodied his invention *is* to be wholly abandoned. A "*few*" may still be constructed after that pattern.

8. It is not safe to assume upon the statement in that letter that the new carriage, which nowhere appears upon the record to have been at all tested in practice, will eventually supersede Webber's carriage, which has successfully stood the trial of more than twelve years' actual service.

9. Whether the new pattern be adopted or not, the merit of Webber's carriage remains the same, and the fact is unaltered that the United States have used the carriage for more than twelve years without paying the inventor anything.

VI.—*If Captain Webber had obtained a patent for his carriage, he would have been entitled to demand the sum of fifty dollars for each carriage constructed for the use of the United States, according to the rate usually charged and received by patentees for the use of their inventions.*

1. This allegation of the petition is predicated upon the supposed cost of one carriage, viz: $600, and the figures are incorrect.

2. Int. 15. "If said Webber had obtained a patent for said gun carriage, what would be a fair or proper price to charge for each carriage made according to his patent, and also for his whole right?"

Ans. "I should say, upon the whole, from ten to twelve per cent. upon the cost of the carriage. In estimating the whole value of the patent I have no data to go upon." (Lester's dep., int. 15 and ans., Rec., p. 25.)

3. One hundred and ninety carriages have been constructed, at an average cost of $550 each. (Colonel Craig's letter, January 11, 1858, Rec., p. 45.)

4. Ten per cent. on the cost of one carriage is $55, and 190 carriages, at $55 each, is $10,450. Twelve per cent. is $66, and 190 carriages, at $66, is $12,510.

5. The petitioner, therefore, is fairly entitled to at least $10,450 for only the past use of this invention. By not taking out a patent, Captain Webber, although in straitened circumstances, has presented to the United States, up to this date, the sum of $10,450 *at least*. If there is no *law*, as there is not, and no *equity* upon which this claimant can stand in her present suit, it is, at all events, based upon the broad, general, and immutable principles of eternal justice.

VII.—"*There are some considerations of an equitable character which may properly be considered*" *by the court.*

1. The United States is the sole depositary of the power to grant exclusive patent rights.

2. The United States is the sole customer for this carriage, because

it alone manufactures and uses the heavy ordnance for which the carriage is especially designed.

3. It is the action of the United States in using the carriage which deprived the inventor of his right to obtain a patent.

4. Webber's omission to procure a patent was founded upon a lofty but entirely erroneous conception of his duty as an officer. He was ignorant of his right to obtain a monopoly of his invention.

5. The United States is bound to procure the best machinery extant for its military and naval purposes, and its past and present action shows that it recognizes and performs this obligation. It is, therefore, so probable as to amount to a moral certainty that if Webber had obtained a patent the United States would have used his carriage, either with or without his consent.

6. If Webber had obtained a patent for his carriage, he had no means of enforcing his right against the United States if the carriage had been adopted without his consent; and whether or not it would have been so adopted, depends entirely upon the view which the officers charged with such matters would have taken of a brother officer's duty.

7. A patent would have been useless to him if he had obtained it, because, whether the United States had adopted his carriage with or without his consent, he would in either case have been compelled to apply for remuneration to its sense of justice and generosity.

8. It is, therefore, inequitable to set up against this claim the strict legal right of the United States arising from the absence of letters patent, which the United States had alone the power to issue, for a machine of benefit only to itself, which it had the power to disregard without fear of legal consequences, which it would not be compelled to respect; and it is especially inequitable where the United States has itself been a party to the only act which confers upon it this strict legal right, and where that act was occasioned by the highly honorable but mistaken sense of duty entertained by one of its own servants.

9. The same principles of equity which are applied by the courts in dealing with transactions between trustees and their *cestui que trusts* should be applied in this case, because—

a. A patent is a grant founded upon a consideration moving from the grantee, made by the people to the inventor. (Phillips on Pat., 2; Hindmarsh on Pat., 104–'5.)

b. The government is a trustee of the power to make such grants; it is the agent through whom the people act.

c. Each inventor has the *right* to letters patent upon performing certain prescribed conditions. The grant is not founded upon grace, but upon right. (Phillips on Pat., 6.)

d. Thence it follows that government is under the correlative obligation to issue letters patent upon the performance by the inventor of the prescribed conditions.

e. Thence also it follows that the power to issue letters patent is a trust held by the government for the benefit of each individual inventor as well as for the people. The government may in this case be considered as a grantee to uses.

f. When, therefore, the government takes, without consideration, the benefit of an invention which was capable of being patented, it is in a situation analogous to that of a trustee dealing with the property of the *cestui que trust*, because, by its own act, and for its own benefit, it has disabled the inventor from performing the prescribed conditions. It takes advantage of a strict rule of law to avoid the performance of a duty, (viz: *to pay* for the use of invention,) which, but for its own act, would be a legal obligation.

g. No agreement between a trustee and *cestui que trust* concerning the trust property ever stands in equity for the advantage of the trustee. (1 Story's Com. on Eq. St., 321–'2, and cases cited.)

h. The assent of the inventor in this case is of no avail, because it was rendered under a mistake.

IVERS J. AUSTIN,
Petitioner's Counsel.

IN THE COURT OF CLAIMS.

SARAH WEBBER, Administratrix, &c., *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim by the administratrix of John A. Webber, deceased, for payment for use by the United States of a gun carriage claimed to have been invented by him, but for which he refused to take out a patent.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

First. Captain John A. Webber was United States military storekeeper at Watertown, Massachusetts, in 1846, and prior and subsequent thereto.

Second. That at or about 1846 an improved gun carriage was constructed at Watertown, for the United States, under the orders of the Ordnance department.

Third. That Major Edward Harding was in charge of the constructions at Watertown in 1853, and had the general superintendence there, but when he took charge is not shown. (Col. Craig's letter, Record, p. 46.)

Fourth. That while Captain Webber had charge of the arsenal at Watertown he had the superintendence and fabrication of a suitable carriage for a 12-inch cannon, which was under trial by Colonel Bomford. (Colonel Craig's letter, Record, p. 48.)

Fifth. That Captain Webber, understanding the patent law, and fully understanding the rights that he might claim if the inventor of material improvements in the construction of said gun carriage, expressly declined to apply for a patent for his invention, under the belief that it would be morally wrong to do so. (Petition, Record, pp. 5, 6; Hickling's ev., Record, p. 9.)

Sixth. That Captain Webber allowed his invention to go into public use, without objection, from 1846, when it is claimed to have been invented, and a carriage was actually made, until the time of his death, in 1855, a period of nine years, without applying for a patent, or sig-

nifying an intention so to do, and thereby dedicated the same to public use, which he never attempted to recall. (Hickling's ev., Record, p. 9; Petition, Record, p. 5.)

Seventh. That Sarah B. Webber is, probably, his administratrix, but that fact is not sufficiently proved by legal evidence.

Eighth. That the acts performed by Captain Webber in making drawings and superintending the construction of the gun carriage, were performed in time for which he was paid by the United States, and the materials used, and the time and expenditures in trying and improving the same, were all at the cost of the government.

These are conclusions clearly deducible from the petition, the letters of Major Harding and Colonel Craig, and the evidence of Hickling.

Ninth. There is no evidence of the value of the invention, except conjectural estimates, founded upon the incorrect basis of allowing a per centage upon the cost of the whole gun carriage, instead of cost of constructing what Webber claimed to have invented.

Tenth. There is no sufficient evidence of what it is claimed Webber invented, so that it can be determined, for a certainty, what was new and what was old in the gun carriage constructed, and no description from which a competent mechanic could construct what the things claimed to have been invented.

Eleventh. There is no evidence showing the new additions made to said gun carriage, so that these can be distinguished from the things claimed to have been invented.

Twelth. From the whole evidence, the presumption is, that the improvement in the gun carriage now claimed as the sole invention of Captain Webber, is the joint production of Colonel Bomford, the workmen at the arsenal, and the said Webber.

LEGAL PROPOSITIONS.

FIRST. *This claim did not originate under an act of Congress, the regulations of an Executive department, or a contract, express or implied, with the United States, and therefore this court has no jurisdiction.*

The petition does not claim that there is a law of Congress applicable to this case, nor that there is a regulation under which an allowance can be made, or that there has been a contract, express or implied. It asks that Congress may pass a law to create a liability against the government. The object in coming to this court seems to be to secure its recommendation to Congress in favor of exercising its generosity in favor of the claimant. This court has no power to do so. It can declare the law upon the facts established by the evidence; and if it finds in so declaring it that there is a legal claim against the government, then it must state the amount of that liability, and report a bill for its payment. In no other case can it rightfully make a recommendation to Congress of any kind, in any case. Congress needs no advice from the judiciary as to the exercise of its discretion or generosity. In creating legal liabilities against the government, the legislative branch acts under the Constitution, and within the powers conferred. The members are selected or appointed by a constituency, who, by their acts in so doing, declare their competency and

fitness to perform their constitutional duties, not supposing that they neeed the advice of any other branch of the government concerning how they shall perform them. Although in England it has been said that the chancellor keeps the conscience of the King, no American legislator will admit that any other person or tribunal keeps his; and certainly the judiciary will not gratuitously claim and exercise that office. All this court can say is, that this is not a case provided for by the law of its organization, and that the claimant has no legal claim upon the government.

SECOND. *No damages can be claimed or estimated, because no right has been violated.*

It is not pretended that any legal right of Captain Webber has been violated, or any obligation with him has been broken. Hence, it is impossible to estimate any damage which he sustained. The government has taken nothing from him, and he lost nothing. His rights have not been trenched upon, nor has the government failed in the performance of any duty towards him. Where there is no violation of rights nor omission of duty, no injury can be sustained. In such case, there is no starting point for estimating damages. The claimant has lost nothing, and so there is nothing to estimate as an amount lost by him.

No damages are proved or estimated; the matter of opinion of what they might have been, if there had been a patent on which to found them, is no evidence of any fact pertinent or applicable to the case.

Speculations as to what might be a fact, under circumstances which were not in the case, are not evidence of any fact whatever.

In this case these speculations are founded upon a mistaken theory. A witness, without any reason for so doing, assumes that some ten per cent. upon the cost of constructing gun carriages would be a proper rule of damages. But why he assumes that per cent. instead of five, fifty, or a hundred, we are not satisfactorily informed.

But why a per centage should be estimated upon the whole gun carriage, which is mostly old, instead of confining it to a per centage on the expense of constructing the part claimed to have been invented by Captain Webber, we are without satisfactory information. The rule of damages now assumed is one expressly repudiated, after full argument, by the Supreme Court of the United States, in Seymour *vs.* McCormick, 16 Howard, pp. 480, 490. The rule then laid down repudiates all speculative damages in patent cases. The court say, "the question is not what *speculatively* he may have lost, but what *actually he did lose.*" It was also held that it was an error to estimate the profits the plaintiff might have made upon a whole machine when he only claimed to have invented a portion of it. The reason is that the profits of construction of what was old and therefore common property which all might use, had no connexion with the profits on manufacturing the patented part of the machine. The infringing party had a legal right to contruct the old part of the machine, and make such profit as he could. The damages to the patentee could arise only for constructing and using the patented part, and if there was no market

price as to the value of that, then facts must be proved upon which the jury (or court) can form conclusions.

In this case the old and new parts are not separated in the estimate, and no one can tell the cost of constructing of either, and there is no market value as to either. If Captain Webber had been a patentee, there are no materials for estimating and adjudging damages. As he was not a patentee, there is nothing to apply the evidence to and nothing to estimate.

THIRD. *There is no sufficient proof of what Captain Webber invented, so that a court can determine what was invented by him, as distinct from the suggestions and directions of Colonel Bomford, and of the mechanics at the arsenal.*

The record shows that the gun carriage was constructed by direction of Colonel Bomford, and that experienced and skilful mechanics were employed and assisted in its construction. How much each contrived or suggested is not shown. The drawings which Captain Webber is claimed to have made, and the oral instructions given by him to the workmen, are not in evidence. The court cannot from the evidence settle these questions. Major Harding's letter does not cover what is now claimed. He says: "Captain Webber takes with him a small handsome model of the eight inch carriage, with some patterns, &c., of *improvements* in the *elevating machine*, and will give you any explanations that may be required; he has devoted a great deal of attention to this description of carriage, and if there is any merit in the thing, (improvements in the elevating machines,) of which I believe there is much, he is entiled to the credit."

This specifies nothing in particular, except the *elevating* machine, nor does it state that Captain Webber had invented anything, but simply that he was entitled to the credit as to the elevating machine. It must be remembered that this was not the carriage of 1846, but one got up seven years afterwards, when additions had been made which were not claimed to have been invented by Captain Webber.

The claimant shows that others co-operated with Captain Webber in contriving the improved gun carriage, and this being so, it rests with him to separate the contributions of each, and show distinctly his own. This not having been done, and he not being entitled to claim the whole, nothing can be lawfully claimed by his administratrix until she proves what was separately the invention of her husband.

FOURTH. *There is nothing described as invented by Capt. Webber, in the evidence in this case, so fully and distinctly, separating the new from the old, and describing the former so that the machanic, skilled in making gun carriages, could construct the same, and, therefore, the claimant cannot recover if Capt. Webber had really made an invention otherwise patentable, and it had been actually patented.*

The 5th section of the patent law (5 U. S. L., 119,) requires, before any person receive a patent, that he shall file drawings and models, and "a written description of his inventlon or discovery, and of the manner, and descriprion, and process of making, constructing, using,

and compounding the same in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most clearly connected, to make, contruct, compound, and use the same."

It is submitted that the description of what Capt. Webber invented is not so described in the evidence in this case, that a person skilled in the art of constructing gun carriages could construct one from it. It follows, if Capt. Webber had taken out a patent for what is described in the evidence, the patent would be void for uncertainty ; and if the United States were suable, and he had brought suit for a violation of his patent, he could not have recovered, because of this want of a full clear, and sufficient description. If this is so, then his administratrix can found no claim upon it, because he could not have recovered if he had had a patent, and it had been violated by them.

FIFTH. *If Capt. Webber had taken out a patent in* 1853, *when he brought his model to Washington, or at any time after* 1848, *for the invention now claimed, it would have been void, because it had been more than two years in public use with his assent.*

The petition and evidence show that the invention claimed had been embodied in a carriage constructed in 1846, and which, with others like it, was thereafter in public use. The 7th section of the patent law (5 U. S L., 119) provides that a patent may be issued where it does not appear that the thing claimed "had been in public use, or on sale with the applicant's consent, or allowance prior to the application."

The 15th section, (p. 123,) in enumerating the defences, provided that the defendant may plead that the invention "had been in public use, or on sale with the consent and allowance of the patentee, before his application for a patent ;" and if such plea should be proved, judgment should be given for the defendant. The act of 1839, as claimed by many, authorizes the use of the thing patented two years before application for a patent, and that, to this extent, the act of 1836 has been modified.

Whether the 7th and 15th sections of the act of 1836 have been modified or not, if Capt. Webber, at the end of two years, after making and using the new gun carriage in 1846, had taken out a patent for the invention claimed, it would have been void, because it had been in public use, and with his knowledge and assent, for more than two years.

SIXTH. *It would be inequitable and unjust, under the circumstances, to require the United States to pay for the use of a thing which they could lawfully use, when they might not have used it at all if they had known that they would be called upon to make the compensation now claimed for such use.*

The evidence shows that various persons in the employment of the United States were concerned in getting up the gun carriage in question, and no one of them claimed that, in doing so, he performed more than his duty. This is true of Captain Webber. The claimant's witness, Hickling, (Record, p. 9,) testifies that he had seen the gun

carriage in question while in the process of manufacture, and "I repeatedly urged him to procure a patent upon it for his own benefit. His reply was, that *he was an officer of the United States government, and in its pay, and he declined for that reason to take out a patent.*"

It is, therefore, clear that he did not intend to tax the government anything for the use of his invention, nor did the government expect to pay him anything therefor. No one can now say that the government would have used the invention, or to what extent, if it had known that a charge of fifty or sixty dollars patent fee would have been exacted for each carriage constructed under its direction. To demand payment now is like requiring a compensation for a gift which might not have been accepted if it had been known that payment would and could be exacted. What the government used was open to the use of all without compensation. Every government and citizen had a right to use freely. No patent appears to have been taken out, even in foreign countries, to secure and protect Captain Webber's rights there, even if he had wished to do so.

It is as unjust now to call upon the United States as it would be to call upon other governments or individuals to pay for what they used because it was public property, which they were at liberty to use freely. The principle insisted upon by the claimant ought never to be sanctioned in law, when it is so repugnant to morals and common honesty.

SEVENTH. *An invention, or other thing, once dedicated to the public can never be recalled.*

To resume a right which a party has once by his acts dedicated to the public use would be a fraud upon the public which no court will tolerate. What an owner has once given to an individual, or the public at large, he should not be allowed to reclaim, because it becomes theirs, and would unsettle legal rights to take it from them. This question was settled by Judge Story in Mellus *vs.* Silsbee, 4, Mason, pp. 108, 111. He said: "I am clearly of opinion that if the inventor dedicates his invention to the public, he cannot afterwards resume it, or claim an exclusive right in it. It is like the dedication of a public way, or other public easement. The question in such cases is a question of fact, has he so dedicated it?"

The fact in the present case cannot be doubted. The claimant proves it, and that it was Captain Webber's intention that the government should have the free use of it.

In Pennock *vs.* Dialoyne, 2 Pet., pp. 1, 15, the Supreme Court said: "It has not been, and indeed cannot be denied, that an inventor may abandon his invention and surrender or dedicate it to the public use. This inchoate right, thus once gone, cannot afterwards be resumed at his pleasure; for where gifts are once made to the public in this way, they become absolute. Thus, if a man dedicates a way or other easement to the public, it is supposed to carry with it a permanent right of usor."

In Shaw *vs* Cooper, 7 Pet., pp, 292, 318, and his language is quoted and adopted by the court.

In McClurg *vs.* Kingsland, 1 How., pp, 202, 207, the preceding cases are referred to and approved.

These cases settle the legal right in this case against the claimant, and unless the court overrule or overlook them, it must say that she has no legal right whatever. Unless the court can say that what was lawfully the right or property of the United States, can cease to be so, and give cause of action against them, it must hold that the claimant is not entitled to anything upon her own showing, even if the case was one of which the court had the most ample jurisdiction.

R. H. GILLET, *Solicitor*.

JANUARY 7, 1859.

IN THE COURT OF CLAIMS.

FEBRUARY 6, 1860.

SARAH B. WEBBER, Administratrix of JOHN A. WEBBER, *vs.* THE UNITED STATES.

LORING, J., read the opinion of the Court.

The petitioner is administratrix of Captain Webber, who, upon the introduction of the large guns known as columbiads, invented a carriage required to remedy the inconveniences experienced from the weight of the gun and its heavy charge when used with the barbette carriage then in use. The claim is for the use of Captain Webber's invention by the United States.

"About 1846, a large chambered gun, having a calibre of twelve inches, and called a 12-inch columbiad, was cast at the foundry of the late Cyrus Alger, at South Boston. The diameter of the base ring of this gun was about thirty-nine inches; it carried a ball of about one hundred and ninety pounds, and required a charge of 20 to 25 pounds of powder as its ordinary service charge. It weighed when fully completed 25,000 pounds. No gun of similar dimensions had ever before been cast in this country, and to be of practical use a carriage of much more than ordinary strength was required, not only to resist the great shock of the discharge, but also to enable the piece to be promptly manœuvred. The barbette carriages in common use were considered wholly insufficient for the purpose, the usual construction not admitting sufficient strength and solidity without being at the same time clumsy and unwieldy." (P. 23, E. A. Lester's dep., ans. 14th.)

A particular description of the carriage invented by Captain Webber is given in the petition, (pp. 4th and 5th,) and the accuracy of that description is vouched by the deponents for the petitioner, (Lester, 13 ans , 22 p. ; Brown, 30th p., ans. 25th,) and the mechanical construction and operation of the carriage is given by Mr. Cooper, (pp. 42, 43, 44, 45.)

The utility of the invention of Captain Webber is shown by the evidence to have consisted principally in these important points:

1. That it reduced the recoil of the gun.
2. That it preserves the horizontal and vertical line of fire, and thus secures greater accuracy of aim.
3. That it could be manœuvred by fewer men.
4. That it was more durable than the carriages previously used.

That these points were attained by the invention of Captain Webber is shown by the testimony of Mr. Lester, who states, (ans. 14th, p. 25,) "Webber's carriage I saw tested several times under direction of Colonel Bomford, Major Wade, and Mr. Alger, and it answered all its purposes to their satisfaction perfectly well."

Mr. Ben. Brown, (ans. 12th, p. 28:) "I saw it tested; I saw a 12-inch gun, mounted on this carriage, fired. Captain Webber was present, and Colonel Bomford, at South Boston. It answered the intended purpose, and was approved of. It wholly obviated the difficulties it was intended to meet." And when asked (p. 29, int. 7) as to the advantages of Captain Webber's carriage over other barbette carraiges, Mr. Brown says: Ans. "It is a more serviceable carriage, and can be manœuvred with fewer men. I have no doubt that it would outwear two of the ordinary carriages."

Mr. Samuel Cooper testifies (ans. 19, p. 35) that in Captain Webber's carriage "the gun carriage is caused to run back, at the instant of discharge, in a line parallel with the axis of the chassis, by which a far greater accuracy of aim is insured than when the bearings are upon the outside of the chassis rails, as in the old carriage.

And (21st ans.) "The Webber carriage is not allowed to wabble from side to side during the recoil, as is the case with the old carriage, whereby a greater accuracy of aim is attained."

And (29th ans., p. 37.) "It is doubtful whether guns of large calibre can be operated upon the carriage and chassis of the old construction, with facility and safety they certainly could not be, whereas they are operated with both facility and safety upon the Webber carriage and chassis."

31st ans. "The carriage moves out, bearing directly upon the chassis, and runs in upon rollers, the effect being a diminished recoil and increased facility for manœuvring."

It also appears that a gold medal was awarded to Captain Webber for the utility and novelty of his invention by the Massachusetts Charitable Mechanic Association, upon a report of a committee of with Colonel Bomford and Major Wade were members, and that the carriage, after being tested and approved by the Ordnance department, was adopted and used by the United States. Colonel Craig, in a letter dated "Ordnance office, Washington, January 4, 1856," addressed to the counsel for the petitioner, (pp. 48, 49,) says: "The carriage then made for the 12-inch columbiad was found to be superior to the model in use for that kind of gun, and it was subsequently determined to adopt the same kind of carriage for the 10 and 8-inch columbiads to be mounted in barbette. * * * There is no specific number of these carriages annually made, the fabrication depending on the requisition for them, and the means available for their construction. The number made since 1846 is 118, and the total number required for all the forts is 1,338. Those yet to be made are now intended to be of the present model, but they may be modified or entirely changed by new improvements." And in a report to the Secretary of War, dated January 11, 1858, Colonel Craig says, in answer to specific questions * * * "It is supposed that the question refers to barbette columbiad carriages, and the number of these which have

been made in the United ates since 1846 is one hundred and ninety, (190.) I may add that it is intended to adopt a carriage for columbiads of an entirely different pattern, and that few, if any more, of the present kind will be made."

That Captain Webber was the inventor of the carriage is shown by the testimony of Mr. Brown, who says, (27th page, ans. 7th,) "I was employed at Watertown arsenal at that time in the shop where gun carriages were constructed. The work was under his direction, that is, Captain Webber's. He drafted a carriage of the kind mentioned, in the carriage shop, before any of them were made, to my knowledge. He called on me to make patterns for the carriage; and was in the shop much of the time superintending their construction. The first of the carriages was made at the Watertown arsenal from Captain Webber's drawings—most of it by myself."

5th ans. It did require drawings. The original drawings were made of the full size. Detailed drawings of all the parts were not made, as Captain Webber gave personal directions in the shop how they were to be made."

And the evidence shows that Colonel Bomford, who was then chief of the Ordnance department, and was engaged in the experiments that tested the utility of the carriage at the time of its construction, and one of the committee of the Mechanical Charitable Association, concurred in the report which awarded a gold medal to Captain Webber "upon the ground that the carriage comprised features that were evidently *novel* as well as useful, (p. 20.) This is evidence of Col. Bomford's opinion that Captain Webber was the meritorious inventor of the carriage, and it is Colonel Bomford's disclaimer of any share or participation in the invention.

And Mr. Lester testifies, (ans. 14, p. 25,) "the combination of the various parts of the carriage was undoubtedly the invention of Captain Webber; no carriage had previously combined them for any useful purpose. * * * * The carriage as it is used now, as I am informed, in the United States service, was, as a whole carriage, invented by Captain Webber, &c."

That the invention was patentable is distinctly stated. Mr. Cooper, (ans. 53d, pp. 41, 42:) "There are several distinct devices in the Webber carriage, each of which I consider patentable. 1st. The method of guiding the carriage upon chassis. 2d. The method of supporting the chassis. 3d. The method of diminishing the recoil and the facilitating the running of the gun into battery. I am also of opinion that were these elements old, Webber would still be entitled to a patent for his carriage so constructed as to enable him to embody in one all these desirable features."

54th ans. "The new and desirable effects produced by this combination may be said to be the hitting of the bull's eye. The one device adjusts the fire in the horizontal field, the other in the vertical field; the intersection of the two passes through the centre of the bull's eye. To adjust in either one or the other field, would not accomplish the end to be attained. But by means of the combination the end is obtained."

55th int. Whether or not said combination, assuming it to have

been first made by said Webber, was *per se* a patentable improvement on other gun carriages? if yea, state why. (p. 42.)

Ans. It was, and for the reasons stated.

And Mr. Lester states (p. 25, ans. 14) that the carriage was patentable when Captain Webber invented it, "because the construction was novel, the combination new, and it obtains satisfactory results not before obtained."

This testimony, that the invention was patentable, with the reasons given, involves the points of originality and utility; and the testimony of the deponents is entitled to consideration from their experience in the very subject matter. In answer to interrogatories Mr. Cooper says, (ans. 4th:) "From the years 1848 to 1852, I was in the examining corps of the Patent Office as principal examiner. I investigated all claims to letters patent for improvements in fire-arms, gun carriages, &c., and it was on my report that the patents were granted or refused therefor." And he states in his 6th ans.: "I was employed to try experiments (at Fort Washington) of the United States Engineer department preparatory to the choice of the gun platform now in use for barbette guns. These experiments involved the practical use of these carriages through a series of years, and required a careful attention to all their exigencies."

Mr. Brown says, (ans. 27:) "I am employed at the U. S. Watertown arsenal as foreman in the carriage shop. I have been so employed for eleven years.

Mr. Lester says, (ans. 4th, p. 21:) "I have been engaged in the manufacture of machinery since the year 1814, I think it was. I have invented and patented several machines, nail machines and water wheels, and also I have invented and patented the pendulum or oscillating steam engine used by the United States government at the navy yards at Charleston and Gosport. I have since the year 1835 been engaged with Cyrus Alger, of the South Boston Company, in drafting and superintending the making of models, drawings, &c., of various machines and structures. * * * * I have also drafted and modelled guns and gun carriages in their employment; the pattern of the 12-inch columbiad, cast, I think, in 1846, was got up by me as superintendent."

On the evidence we think the carriage in question was invented by Captain Webber, and was a new, useful, and patentable invention.

It has been shown by the extracts from the letters of Colonel Craig, chief of the Ordnance department, cited, that the United States used this carriage and made 190 of them. And Mr. Brown testifies that one hundred and seven of them were made at Watertown, for different ordnance, (ans. 20th, p. 29,) and that drawings were ordered at Watertown by the Ordnance department, for Watervliet arsenal, and there were sent, and subsequently a carriage also was sent to that arsenal.

This evidence proves that the United States used the carriage invented by Captain Webber, from about 1846 to about 1858.

But Captain Webber did not take out a patent for his invention, and on this subject the petition avers "that the said John Webber did not apply for such patent solely because he labored under a mis-

taken belief that it was his duty, as a person employed by the United States, to devote all his energy and all his ability, of whatever kind, to the benefit of its service, although your petitioner doth insist that it is not and never was a part of the duty of a military storekeeper to invent machines of any description for the benefit of government; and that by reason of such mistaken idea, the said John A. Webber cannot be deemed to have intended to abandon, and that he did not in fact abandon, to the public the aforesaid patentable inventions of improvements in gun carriages." (pp. 5th & 6th.)

That Captain Webber had a right to take out a patent for his invention, which would have secured him his rights as inventor, against the United States as well as against individuals, is certainly true. But we think the evidence does not support the suggestion that he was mistaken as to, or ignorant of, his rights. The whole testimony on this point is the statement of Mr. Charles Hickling, a deponent for the petitioner. He states, (ans. 11th, p. 9:) "Several years before his (Captain Webber's) death, I knew that he had invented a gun carriage, about which I often conversed with him." * * * "I repeatedly urged him to procure a patent upon it for his own benefit; his reply was that he was an officer of the United States government, and in its pay, and he declined for that reason to take out a patent."

This, we think, is as attributable to a very scrupulous and self-sacrificing delicacy as to any mistake or ignorance of his legal rights, that therefore it does not prove the latter; and then the facts merely are, that Captain Webber invented a patentable gun carriage and permitted the United States to use his invention for eight or nine years, without claim by him, and declined to take out a patent therefor.

No legal claim can be founded on the use of an invention not patented, and the petitioners, therefore, have no legal claim against the United States. This is admitted by the counsel for the petitioner, who desires only that the facts of the case may be stated and transmitted to Congress.

We are of opinion that the petitioner is not entitled to relief in this court.

36TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 246.

J. EDDY'S HEIRS.

MARCH 1, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

THE COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JOSHUA EDDY'S HEIRS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documentary evidence received from the House of Representatives under the resolution of the 21st of February, 1856, used in the case and returned to that House.
3. Brief and argument of claimants.
4. United States Solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, at Washington, this first day of March, A. D. 1860.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the Court of Claims of the United States.

The undersigned, sons and heirs at law of Captain Joshua Eddy, late of the army of the revolution, continental line, residents in Middleborough, Massachusetts, claim as due from the United States to Captain Joshua Eddy, at the time of his decease, a *full year's pay and interest*, to which he was entitled as a *supernumerary* officer, on the new arrangement of the army, by virtue of a resolve of Congress, passed November, 1778. They claim also a balance due him at that time for actual service and the interest of the same.

That he was a supernumerary, and entitled under that resolve, sufficiently appears by the accompanying paper marked A, expressly so

declaring, and that the same is not credited in his account on the revolutionary ledger, appears by the statement of the Hon. A. Hale, paper C. That a balance is due Captain Eddy for services, appears by the examination of Mr. Hale (representative) of the books in the office, in the presence of Mr. Hagner, the clerk, as by a letter of Mr. Hale to the undersigned in 1847, marked E.

Our father served in the revolutionary army four campaigns, at first as lieutenant, and in 1777 and 1778 as captain. In 1778, October, he received an indefinite furlough, by order of Gen. Washington, and afterwards, on his own request, became a supernumerary, as before mentioned. These facts have been several times verified in the Pension Office, and before several committees of Congress ; in June, 1819, and August, 1832, in the Pension Office, and in 1849 and 1850, before the Committee on Revolutionary Claims, when bills in favor of the claims were reported, and in 1849 passed the House.

On being informed of the pension bill of 1818, our father promptly said "I have never received my extra pay, my commutation." One of us forthwith drew a petition to Congress, without rightly apprehending his claims, praying for the payment of his commutation. Our representative, Mr. Sampson, to whom the petition was transmitted, informed us that there was no resolve under which he was entitled to commutation or extra pay, and he had consented to a withdrawal of the petition, and filed the petition in the Pension Office. This was June, 1819.

It seems no very diligent search was made. Our first knowledge of the resolve of 1778 was in 1845, when we preferred our petition for the year's pay. It was transmitted to Mr. Hale, then our representative, and on applying to Mr. Edwards at the Pension Office, for information, the answer was that "he (our father) did not become a supernumerary." But on pressing a diligent search, it soon appeared that he *was*, and had land granted as such. (See papers A and D.)

A bill was reported by the Committee on Revolutionary Claims, and passed the House, and came up in the Senate, in February, 1849, was postponed for a few days, and was not afterwards reached. (See Mr. Hale's letter marked E.)

In 1850 we preferred a petition for the same object, and Hon. Mr. Fowler, our representative, got it committed to the Committee on Revolutionary Claims. He wrote us that he caused all the papers, including the petition and report of 1819, to be laid before the committee; that they were unanimous in favor of the claim, and had brought in a bill accordingly. In May, 1851, he wrote us that the bill had not been reached during the session. (Paper F.) Since his decease, we have not again moved the matter in Congress, and are happy that the claim is now before a tribunal which does not call for ten years' attention, and where right and justice may be speedily obtained.

We might mention the retired condition of our father, and indeed of ourselves, in explanation of want of early information of the resolve, the embarrassed condition of the finances after the war, when the patriots of the revolution were in no special favor, until the time of the first pension law; but, whatever may have been the reason, we

have the strongest assurance that he never received his year's pay under the resolve of 1778, and that a balance is due to him for services after he obtained his furlough. He deceased in May, 1833, aged 85. A speculator told him in 1794 that he was entitled to land, and he assigned him the claim for a trifle.

JOSHUA EDDY.
ZECHARIAH EDDY.
NATHANIEL EDDY.
WILLIAM S. EDDY.

County of Plymouth, State of Massachusetts:

FEBRUARY, 23, 1856.—Then Zechariah Eddy, above named, made oath to the truth of the facts contained in the foregoing petition, before me

AUGUSTUS H. SAULE,
Justice of the Peace.

Commissioner of Pensions to Mr. Hale.

PENSION OFFICE, *December* 19, 1846.

SIR: I herewith return the letters which you left here in the case of Joshua Eddy, deceased, and have the honor to inform you that the records and papers on our files show that he retired from the service on the the 15th of October, 1778. As he did not serve till the close of the war, or become supernumerary, he acquired no right whatever to commutation, bounty land, or the benefits of the act of May 15, 1828, at $480 per annum.

The pension which he received under the law of March 18, 1818, and which his widow was allowed under the act of June 7, 1832, to the day of her death, is all that was due on account of his revolutionary service.

I have the honor to be, very respectfully, your obedient servant,
J. L. EDWARDS.

Hon. A. HALE, *House of Representatives.*

Commissioner of Pensions to Mr. Hale.

PENSION OFFICE, *January* 28, 1847.

SIR: I herewith return the letter of Mr. Eddy, and have the honor to state, that on a further examination in the case of Joshua Eddy, I find that he became a deranged officer on the 15th of October, 1778; and, as such, was entitled to bounty land, and one year's extra pay. A bounty land warrant, No. 656, for 300 acres, was issued to his assignee, Samuel Emery, on the 4th of November, 1794. For information relative to the extra pay, I would respectfully refer you to the

Third Auditor, as the books of this office do not show whether it was paid or not.

I have the honor to be, very respectfully, your obedient servant,

J. L. EDWARDS.

Hon. A. HALE, *House of Representatives.*

Certificate from Pension Office.

WAR DEPARTMENT,
Bounty Land Office, February 18, 1829.

By the records of this office, it appears that warrant No. 656, issued on the 4th of November, 1794, for 300 acres, to Samuel Emery, as assignee of Joshua Eddy, a captain of the Massachusetts line, for his bounty land.

ROBERT TAYLOR.

It appears by the return of officers in this office, that Capt. Joshua Eddy became a supernumerary the 15th of October, 1778, and thereby he became entitled to bounty land.

ROBERT TAYLOR.

FEBRUARY 21, 1829.

PENSION OFFICE, *March* 18, 1850.

I hereby certify that the above is truly copied from the original upon file in this office.

J. L. EDWARDS,
Commissioner of Pensions.

Third Auditor to Hon. D. P. King.

TREASURY DEPARTMENT,
Third Auditor's Office, December 27, 1847.

SIR: I have had the honor to receive your letter of the 24th inst., in which you ask "to be furnished, for the use of the Committee on Revolutionary Claims, with a transcript of the account of Joshua Eddy, who was a captain in the army of the revolution, as it appears upon the books in your office."

Also "any information to be found there tending to show whether said Eddy has received the year's extra pay to which he was entitled as a deranged officer or not."

I send herewith a transcript of an account of Captain Joshua Eddy. The very imperfect state of the revolutionary records in this office prevents me from ascertaining how or when this account was settled.

In reply to your inquiry I have to state that there are no means in this office of ascertaining at this late day whether Captain Eddy received the year's pay that he became entitled to as a supernumerary

officer. The resolve of Congress making this grant, directed that payment thereof should be made by the paymasters of the respective regiments. The rolls of these paymasters are believed to be no longer in existence, having been destroyed in the burning of the public buildings. Captain Eddy received the land to which he became entitled, and the inference would seem to be, that he received the other portion of the grant to which he became entitled.

With great respect, your most obedient servant,

PETER HAGNER, *Auditor.*

Hon. Daniel P. King,
Chairman Com. on Rev'y Claims, House of Reps.

Affidavit of Z. Eddy.

I, Zechariah Eddy, of the town of Middleboro' and county of Plymouth, Massachusetts, counsellor at law, do testify and say that I am sixty-seven years of age; that Joshua Eddy, captain in the army of the revolution, was my father, and died in the year 1833, aged eighty-five years; that he received a pension as such captain under the law of Congress of 1818, for a short time, and afterwards pay under the law of 1832, until his death; that I remember a person, whose name it seems to me was Emory, called upon him not long after the news of the defeat of our army, under General St. Clair, by the Indians, and told him he, as a deranged officer, was entitled to lands, which appeared to be news to my father, and he sold him the right; that early in the year 1818, on hearing that Congress was moving in favor of the surviving officers and soldiers of the revolution, my said father told me "he had not received his commutation," and I forthwith drew a petition to Congress stating his services, and praying that he might receive it; and also for other lands which he said he had been told he was entitled to. I did not then know that there was any law or resolve by which he was entitled to any "commutation," nor of any resolve applicable to deranged officers. I had heard that certain officers received a "commutation," and I have no reason to think he had heard anything more; that he signed the petition, and I sent it to Mr. Sampson, the representative to Congress from this district, and received a letter from him acknowledging the receipt of it; that said Sampson afterwards copied out certain resolves on the subject of half pay and commutation for the officers of the army, and sent them to me, saying that there were no others, and that my father was not entitled under them; that I thereupon directed him to file the petition and papers in the Pension Office, and January 8, 1819, he wrote me that he had filed them according to my direction. About two years ago, a friend, who knew of my father's services, wrote me that he was entitled to a year's pay, as a deranged officer, in November, 1778, and, after inquiry on the subject, the present petition was preferred. Father used the word "commutation" with reference, I have

no doubt, to what he had been told the deranged officers were entitled to. His petition, in 1818, shows how he considered it.

ZECHARIAH EDDY.

COMMONWEALTH OF MASSACHUSETTS, *Plymouth County, April*, 1848:

Then the above named Zechariah Eddy signed and made oath to the above affidavit.

ELIAB WARD, *Justice of the Peace.*

Affidavit of Joshua Eddy.

I, Joshua Eddy, of Middleborough, Massachusetts, testify and say, that I am sixty-nine years of age, being the eldest of the children of Joshua Eddy, deceased, late captain in the army of the revolution; that I remember a man (I think his name was Emery) called on my said father to buy some land, which he said he was entitled to as a captain in the army. The claim appeared to be new to father, but, for a small sum, I understood he sold him his right. I should think I was then sixteen years of age.

Early in the year 1818, when a movement was made in Congress in favor of the officers and soldiers of the revolutionary army, I heard father say "he had never received his commutation," and I understood he got my brother, Z. Eddy, to write a petition to Congress to obtain it; I understood our representative wrote back that there was no law or resolve applicable to his case. I knew nothing of the laws or resolves of Congress on the subject, nor have I reason to believe that father knew anything of them, except that he had heard the officers were entitled to a "commutation."

My father received pay as a captain under the law of 1832 until his death in 1833, after which time my mother, Lydia Eddy, received it until her death in 1838.

I signed the present petition on being informed that there was a resolve in favor of the deranged officers of the army.

Father used the word "commutation;" I have no doubt he referred to what he had heard of his being entitled to a year's pay as a deranged officer. I think his petition to Congress at that time shows that he so viewed it.

JOSHUA EDDY.

COMMONWEALTH OF MASSACHUSETTS, *Plymouth County, March*, 1848:

Then the above named Joshua Eddy signed and made oath to the above affidavit.

Before me: PETER H. PEIRCE, *Justice of the Peace.*

[Extract from Third Auditor's books.]

DR. *Capt. Joshua Eddy of Colonel Bradley's Connecticut Regiment.*

1778.

Jan.	405.	To William Palfry.....	174 50
June.	1049.	To Colonel Gamaliel Bradford.....	1,000 00

1088.	To State of Massachusetts.....	479 58
1088.	To Major General Heath.....	108 00
1089.	To the United States.....	21 00
1223.	To the State of Massachusetts.....	160 00
		$1,943 08
Cr. 1090.	By the United States.....	2,723 30
		$780 22

Extract from ledger B. in Third Auditor's office.

IN THE COURT OF CLAIMS.

No. 525.

JOSHUA EDDY'S HEIRS *vs.* THE UNITED STATES.

FINAL BRIEF OF THE CLAIMANTS.

We are surprised that the statute bar should still be insisted on against the claim. It has been reported on favorably by several committees, both of the Senate and House, and once passed the House, and nothing said about this bar; and we cannot think Congress are disposed to interpose it against a revolutionary claim well supported by the evidence.

So, also, in respect to the presumption of payment. The Solicitor says there "is not a particle of evidence to rebut that presumption." But certainly the committees and House must have viewed the matter in a different point of light; for without any evidence but the papers from the offices and bureaus, they sustained the claim, even without any argument to enforce it. It seems to us there is everything to rebut such a presumption which the nature of the claim admits of. We will suggest some particulars. Captain Eddy left the army on the death of his father, before any resolve was passed in favor of the deranged officers, and before the new arragement of the army, on an indefinite furlough specially granted by General Washington, not expecting to return. His home was in a retired country place, far removed from the army and from the seat of government. There were no mails or newspapers in his region. It was manifestly unknown to him that the resolve granting the year's extra pay had passed Congress, and so little money was in the treasury that the whole army were for a long time without pay. When (1818) that army came into favorable remembrance, he first heard that some special provision had been of old resolved upon by Congress, and he forthwith (without knowing what that provision was) preferred his petition for his commutation, or whatever that provision might be, and our representative made search and reported to him that there was no resolve under which he could claim, and he died in the belief that there was none. When *we* afterwards were better informed, and preferred our petition, Commissioner Edwards made the same report, as the evidence shows, that is to say, that our father was not a deranged officer. Here is certainly *some diligence*.

Is not an account on the revolutionary ledger some presumption of non-payment? *There is the account—it probably includes in the credit the year's pay under the resolve and his wages from June to October.* Can any man say with reason "this is no presumption of non-payment?" A presumption may be rebutted by any kind of evidence, but here is evidence of the *most stringent* kind. That the loose manner of keeping accounts and of calling their agents to account may operate very inconveniently to the government, (if such were the case, and as to which we know nothing,) is no satisfactory answer, and it seems to us a party must be put to great straits to allege it. *There it is—this whole claim stands credited on the defendant's books*, made earlier or *later—there it is;* and the claim was not made because it was there. The coincidence is striking, and goes far, we must think, at least to rebut the presumption set up by the Solicitor.

Then his (our father's) declaration, forty years ago, that "he had not received his commutation"—it is said "this was not commutation." But it must be considered that these distinctions were not known to retired people in the country as they are known to people who see the courts; it was merely known to him that there was a public provision in which he was interested. We ourselves were forty years of age and knew nothing of the distinction.

As to Colonel Bradford, our father received a special furlough, granting him leave to return to his friends for an indefinite length of time, and had no other discharge, and was not present at the new arrangement of the army; and we think he never saw the colonel afterwards, and we never heard his name mentioned till our father applied for a pension. We have no reason to believe, nor do we think our father had, that there were any funds in his hands for paying the deranged officers, and it is pretty well known that public funds were then scarce, and continued so for a long time, and this statute bar was early interposed against all similar claims, as we know was the case in respect to General Hamilton's widow, though she was afterwards paid.

This case is no *pretence:* it has not been blown up by the aid of counsel, or witnesses suborned. It is left to speak for itself from the official files.

JOSHUA EDDY.
ZECARIAH EDDY.
NATHA'L EDDY,
For himself and Wm. S. Eddy.

IN THE COURT OF CLAIMS.

No. 525.

REPRESENTATIVES OF JOSHUA EDDY *vs.* THE UNITED STATES.

Argument of the Claimant.

We have received copies of papers which are said to have been "admitted in evidence by the Solicitor," with information that he would proceed to the trial *immediately*, and it seems we are finally to add

all we have further to say. We had supposed the court would look into some other papers than those which were printed and sent us; as the several reports of the committees of the House, and the communications of Mr. Hale, referred to in the petition, especially, we supposed, the *furlough* which our father received on leaving the army, which we enclosed in the petition for a pension under the law of 1818. That furlough was signed by Adjutant General Scammen, by special direction of Gen. Washington, in October, 1778, which gave him general permission to return to his family, in Massachusetts, and he did so return, and did not again visit the army, and we do not think he ever after saw any paymaster, either of the regiment or the treasury.

The letter of Mr. Edwards, January 28, 1847, shows that our father was entitled to receive the year's extra pay under the resolve. The letter of Mr. Hagner, Auditor, shows the amount of debit and credit on the books of the United States, from which it appears that seven hundred and eighty-one dollars and twenty-two cents is the sum due our father on those books. There are no particulars given in the credit set to his account. Whether it included the year's pay, which was to be allowed under the resolve or not does not appear. But that it must have included his wages, after receiving his furlough, and until his discharge, is very probable, as he was entitled to them, although not aware of it himself. BUT THERE IT STANDS ON THE DEPARTMENT'S OWN BOOKS, and there is nothing to repel the idea of payment, except the long time that payment has been withheld; and the court will consider that that time may well give expectation of interest.

It was suggested to us that the statutes of limitations barred the claim, and we have already said all we propose to say on that subject, presuming that a proper sense of justice would dictate the payment of a demand clearly established, and that such had been the practice in Congress.

It was suggested also that the lapse of so many years would raise a presumption of payment, unless some reason therefor should be assigned. Our memory goes back to the close of the revolutionary war, and we always lived either in the house with our father, or next door neighbors, and have the utmost cofidence that he never received a dollar from the United States, after his return to his family under his furlough. His life was very retired, and for a great many years after the war there was no mail route within a dozen miles of him, and we think no post office near him until his decease. We never heard him speak of any claim under any resolve of Congress until 1818–'19, when, on finding his right to a pension, he said he had "never received his commutation." On preferring his petition therefor, our representative wrote us as stated in our affidavits,* and neither our father nor ourselves knew of the resolve of 1778, until a friend informed us of it in 1845, whereupon our petition was presented to Congress in 1846 by Mr. Hale, to whom we enclosed the said letter of Mr. Sampson, to account for the delay. So here is twelve or more years of delay, with a favorable report of committee after committee, and one vote of the house in our favor.

[Page —. "no law or resolve applicable to his case."]

The chance of getting anything out of the treasury for many years after the war, the court knows, was very small, and the officers and soldiers were in no very good repute until another tug of war was had in 1812. The result of Mr. Sampson's researches is not very strange. Mr. Edwards, on his first examination, came to the same result. (See his letter of 1846.) Mr. Sampson had deceased before this time. Mr. Hale is living, and, if nesessary, his letters can be verified.

Candor would seem to call upon us to admit that we consider the extra year's pay included in the credit of two thousand seven hundred and twenty-three dollars and thirty cents, entered on the books to the credit of our father; if so, we appeal to the court that it removes all presumption of payment.

JOSHUA EDDY.
ZECHARIAH EDDY,
For themselves and the other Representatives of Joshua Eddy, deceased.

MIDDLEBOROUGH, Mass., *March* 9, 1859.

MONTGOMERY BLAIR, Esq., *Solicitor*.

Mr. Buffington, of the House, has communicated to us a note from Mr. Huntington, proposing that the claimants should furnish a brief, and then "he will submit a brief which will show the precise difficulties of the case."

We are in the condition of the knife grinder's story: "God bless you, we have none to tell, sir." Our case is stated with precision in our petition, and Mr. Buffington kindly offered to present it, through the clerk, with the papers and documents which are therein referred. We employed no counsel either before the committees of Congress, (House or Senate,) relying entirely on the justice of the claim. The counsel fees would probably long ago have twice exceeded the claim. We have never heard of any objection to the justice of it, either on the part of the committees in Congress or in this court. During the time the claim was before Congress, three favorable reports have come into the House, and one in the Senate, and not one adverse report; and it seems this court think favorably of it, and that an opinion in its favor was drawn up by judge Gilchrist, which did not come into the hands of the court until after his decease. We are not informed *now* that the court have any difficulties about the case. We are not aware that any objections to the justice of the claim have been intimated to Mr. Buffington. It was suggested to him that the petition should have been made by the administrator; but, as captain Eddy's estate was settled by his heirs among themselves, and no administration was granted, and twenty-five years have elapsed since his decease, and as the laws of this State limit original administration to twenty years, the rule was dispensed with, in favor of the justice of the claim.

It was afterwards suggested to Mr. Buffington that there was a statute bar against all claims of the kind. We were surprised at this, as no such objection had been made in Congress, or by any of the committees who had it in charge, and it seems quite incredible to us that

the United States should interpose a statute bar against claims admitted to be just, and especially this of our father's, which has been diligently prosecuted these forty years. We have not these statutes at hand, and cannot think Congress would hold them up against a claim of the justice of which the court should be satisfied.*

No other objections have been made known to us, or, as we think, to Mr. Buffington, who has kept us informed of the progress of the case through the clerk.

And now, unless the court desire it, to have another argument as to the allowance of so small a claim, is very grievous, and we may about as well abandon it as to engage able counsel to argue it. But if you think your official duty requires to ask for a rehearing, or if the court order a new argument, you are at liberty to consider this communication as a *brief*, but not as waiving any reply which we may make, after receiving an account of the brief which you shall submit; for of course it will contain *new matter*, and will require an answer.

If this is to be our brief, please place it in the hands of the court. We are now very aged and much desire to see the end of the case.

JOSHUA EDDY.
NATH. EDDY.
ZECHARIAH EDDY,
For himself and William S. Eddy.

EAST MIDDLEBOROUGH, Mass., *January* 25, 1859.

IN THE COURT OF CLAIMS.

No. 525.

JOSHUA EDDY'S HEIRS *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

The petitioners claim one year's pay due their father as a deranged officer under the resolution of Congress of November 24, 1778. (3 Journal, 133.

This claim is barred by acts of limitation. (See Chamberlin's Reps. *vs.* The United States, in this court.)

But, if it were not, the circumstances raise a presumption of payment, and not a particle of evidence is offered to rebut that presumption. The claimants show that Joshua Eddy became entitled, on the 24th of November, 1778, to receive a certain amount of money, and they require the United States either to pay the money or show that it has been paid. To sustain the ground on which this claim is rested would be, in effect, to compel the United States to pay most of the expenses of the revolution over again. The service of tens of thousands of officers and soldiers may be proved, while the records of the treasury contain very few, perhaps not one hundreth or a thou-

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*NOTE.—We recollect that not long after the death of General Hamilton, Mrs. Hamilton petitioned Congress for his *half-pay*, and that the committee reported the *statute bar*; but Congress, notwithstanding, granted the prayer of her petition.

sandth part, of the vouchers for payments made during the revolution. Many were never rendered to the treasury, and still more have been lost or destroyed during the seventy-five years that have elapsed since the close of the war. In this case it was the duty of the paymaster of Bradford's regiment to pay Captain Eddy. His rolls cannot be found at the treasury, and are believed to have been destroyed. It was the practice of the paymasters to pay the deranged officers; that was the rule. The petitioners seek to establish an exception. The presumption is, that the paymaster of Bradford's regiment did what all other paymasters did; that he acted in Eddy's case as he acted in other cases—that is to say, that he paid Captain Eddy all that was due him.

The only circumstance relied on to rebut this presumption is, that Captain Eddy went home on furlough; and it is argued that, being absent from the army, he knew nothing of the passage of the resolution of November 24, 1778. But the same was the case with many officers included in the resolution, as appears from the provision that they are to be paid "from the time such officers had leave of absence from the commander-in-chief on this account." It was in part for officers so furloughed that the resolution was passed; and if Captain Eddy knew nothing of the resolution because he was on furlough, then none of the officers so furloughed knew anything of it, and they are yet to be paid.

But the furlough could not have been the last public act which came to Captain Eddy's knowledge. That did not discharge him finally from the army. He certainly did not remain during the remaining five years of the war on "leave of absence." He must have had notice in some form that he was out of service. This notice he may have had by writing from the headquarters of the army; or it may have been conveyed to him by the resolutions of Congress of November 24, 1778, confirming and adopting the new arrangement which had been made. But whenever, and in whatever mode, he learned that he was finally released from military service, he must be presumed to have learned then, and by the same mode, the conditions on which he was released.

Captain Eddy lived for more than forty years after the year's pay became due him, yet he never applied for it. He never denied that he had received it. The expression attributed to him, and so much insisted on, that *he had not received his commutation*, cannot refer to this claim. The extra pay was not commutation, and never was known or called by that name. When he said commutation he meant commutation, and did not say or mean extra pay.

The petitioners claim also a balance standing to the credit of Captain Eddy upon a ledger in the Third Auditor's office. This claim is also barred by limitation.

The auditor, in a letter dated December 27, 1847, transmitting a transcript from the leger, says: "The very imperfect state of the revolutionary records prevents me from ascertaining how or when this account was settled." To give any value to this evidence it should be shown that it was the last account settled between the parties; but the last date is June, 1778, and Captain Eddy was in service four

months longer. Accounts must have beem subsequently settled with Captain Eddy; and the presumption is, that all items to his credit were carried into the subsequent settlements.

This ledger does not purport to show the result of an account stated between the government and Captain Eddy. The ledger purports to show only so many items on either side, not all the items. It may show, and probably does show, all the items that came to the knowledge of the person who kept the ledger; but there is no reason to believe that all the payments which were made to Captain Eddy came upon that ledger. Indeed, we know they did not; for Captain Eddy was paid at least to the 15th of October, 1778, and the ledger shows no entry later than June, 1778.

In fact, it has been abundantly disclosed in trials in this court that these ledgers are utterly unreliable. They are not contemporaneous records. They are not books kept during the revolution, but were made up some years after the war in pursuance of a design, which was never effected, to analyze and arrange the great mass of revolutionary accounts settled by paymasters, commissioners, and others. The plan seems to have been to state an account with every person who had received or had made payments or advances from or to the United States; but as advances were received from many persons and payments made to many others, it followed that if any returns were deficient the account might be imperfect; and such is the fact. The accounts on these ledgers are mere fragments, and this court has refused to consider them as evidence of debt against the United States. (See Greer's Adm. *vs.* The United States.) There is in the Register's office a series of books recording accounts settled by the proper officers of the treasury from the revolution to the present time; but the ledger on which is found the balance here claimed forms no part of this series.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

FEBRUARY 6, 1860.

J. EDDY ET AL. *vs.* THE UNITED STATES.

LORING, J., read the opinion of the Court.

The petitioners are the heirs and distributees of the estate of Joshua Eddy, of Massachusetts. He died more than thirty years before the petition in the case was filed in this court. Letters of administration were never taken out on his estate, and they cannot be now by the laws of Massachusetts.

The petitioners are the only persons having any interest in the claim now made.

This case was referred to this court by the order of the House of Representatives.

Joshua Eddy was a captain in the army in the war of the revolu-

tion. He did not serve to the end of the war, but he became a deranged officer or supernumerary 15th October, 1778, and as such was entitled to bounty land and one year's extra pay, under resolution 24th November, 1778. A bounty land warrant was issued to his assignee 4th November, 1784. By the resolve of Congress making the grant, the one year's extra pay was payable to him by the paymaster of his regiment. The record states, (p. 7 :) "The rolls of these paymasters are believed to be no longer in existence, having been destroyed in the burning of the public buildings." He received a pension under the law of 18th March, 1818, until his death, and it was extended to his widow under act June 7, 1832. (R., p. 5.) He died in 1833, aged eighty-five years.

The petitioners claim—

1. One year's extra pay as a captain, due to Joshua Eddy as a deranged officer.

2. A balance of account due to Captain Joshua Eddy for services at the time of his death, and interest on these items.

The evidence relating to the first item, viz: one year's extra pay, is the statement of the Commissioner of Pensions (R., p. 5) that Captain Eddy "became a deranged officer on the 15th of October, 1778, and as such was entitled to bounty land and one year's extra pay."

The evidence relating to the second item, the balance of account, is shown in the "extract from ledger B, in Third Auditor's office," which begins in January and ends in June, 1778, and exhibits a balance in favor of Captain Joshua Eddy of $780 80. (Record, p. 7.)

Since the claims alleged became payable, eighty years have elapsed. For fifty-five years of that period Captain Eddy was living, and there is no evidence that during his life he ever claimed of the United States or asserted to any one that any such debts were due to him; while, on the other hand, it appears that he made and specified other claims, (as for "*commutation*,") assigned his bounty land warrant as early as 1794, and secured a pension, and thus attended to and acted on claims against the United States.

By the general rule of law and of equity the lapse o twenty year, without a demand establishes the presumption of payment of a bond of a judgment at law, or a decree in equity. "It is obvious to remark, that if a contrary doctrine prevailed, and it were necessary to adduce satisfactory evidence, that every act which is presumable was in reality performed; time, far from strengthening titles, would, by increasing the difficulty of proof, gradually diminish their securi y, and, instead of affording protection against ancient demands, would probably contribute to their assertion." Such being the rule at law and in equity, the lapse of more than half a century without a demand by the decedent, the party to whom payment was to be made, must certainly fix the presumption of payment as against his representatives, and must absolve the United States from adducing any other evidence of payment.

The effect of the presumption, then, in this as in all like cases, is to impose upon the petitioners the burden of showing that the claims have not been paid. The evidence they adduce from the books of the United States has no such tendency; it only shows that the claims

were once due, and this is involved in the presumption stated, that they have been paid.

In reference to the second item of claim, viz: the balance of account for services, $780 80, it is urged in the brief for the petitioners that "*this whole claim stands credited on the defendant's books.*" This assertion seems to assume that this "ledger B in Third Auditor's office," and the books of that class, are to be assimilated to "*books of account*" between individuals. But these latter have their force as evidence, because they consist of entries made in the progress of transactions to which they relate, and by parties acting in them and cognizant of them, while such books as ledger B, adduced here, are understood not to have been so made, but to be merely compilations of items from the incomplete and fragmentary returns and official documents which could be found in the department after the war of the revolution, and to have been made for the purpose of arranging *such evidence as was there possessed* for official convenience, and nothing more.

Besides, by the mode of keeping the accounts of the United States, established by law, "*balances*" are entered and shown on the books of the registry, and the books of the Third Auditor are not evidence of "*a balance*" struck, nor any admission by the United States that "*a balance*" is due; and the result of an account there is, in itself, only an an item of an account which may be, and often is, overborne by an item in an another office of the department. And in this case, whatever effect might be due to an item of account shown in the Third Auditor's book in June, 1778, is, as stated, entirely removed by the presumption of payment, arising on the lapse of time without a demand by the decedent, connected with the fact that many of the books of the Treasury have been destroyed by fire.

On the whole case, we are of opinion that the petitioners are not entitled to the relief they pray.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 247.

CHARLES A. DUBOIS DE LUCHET.

MARCH 1, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

CHARLES A. DUBOIS DE LUCHET *vs.* THE UNITED STATES.

1. The petition of the claimant, with Exhibts No. 1, to No. 6, inclusive, and also No. 1, A.
2. United States Solicitor's brief.
3. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, at Washington, this first day of March, A. D. 1860.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Clams.

To the honorable the Judges of the United States Court of Claims:

The petition of Charles A. Dubois de Luchet, a subject of his imperial majesty, the Emperor of the French, (a sovereign in amity with the United States of America,) respectfully represents:

That your petitioner has a claim against the United States, as hereinafter explained, of which said claim he is advised that this honorable court hath jurisdiction.

That the said claim arises, as against the United States, under a treaty and law of the United States, and under a contract express and implied, and by the law of nations and the law of mortgage; so that the said claim is clearly within the terms of the act of Congress which constituted this honorable court.

And your petitioner further shows, that the said claim is for tho

amount, with interest, of certain large sums of money, which, by supreme decrees and laws of the republic of Mexico, were and are charged upon certain lands, which, since the said sums of money and interest were charged thereon, and since the same lands have been hypothecated for the payment thereof, have been ceded and conveyed to the United States, with prior actual notice of the existence of such charge and hypothecation.

And further he shows, that the said charge and hypothecation were not only upon the same lands, but expressly upon the proceeds and purchase-moneys thereof; so that, from the time that the United States of America held the proceeds of such cession and sale of lands, bound by the said charge and hypothecation. And actual notice and information having been given by your petitioner to the United States, (as hereinafter more particularly set forth,) prior to any payments of such proceeds to the republic of Mexico, and prior to the acceptance and consummation of the said cession and sale, and prior to the ratification of the treaty therefor, your petitioner is advised and claims, that, in equity and conscience, as well as in strict law, the said United States of America are bound for the payment of the said debt and interest, so as aforesaid charged and secured in the premises.

Your petitioner shows, in stating his said claim, that he is the holder, for valuable consideration, and *bona fide*, of a large amount of the bonds of the republic of Mexico, commonly known and described as the "*Copper Bonds*;" and that he was such holder long before the sale and cession of lands hereinafter mentioned.

He further shows, that he is the agent and lawful attorney in fact of divers and sundry persons who, in like manner, were and are the holders of other such bonds to a considerable amount.

And he herewith exhibits, marked No. 1, a statement of the particulars of his own personal claim in the premises, holding himself ready to produce and prove the original bonds when and where this honorable court may direct.

Your petitioner further shows, that the said bonds originated as follows:

On and prior to the 24th day of November, 1841, as appears by the preamble of a decree of that date, there was in circulation in the republic of Mexico "an enormous quantity of copper coin," "of imaginary value," "far above the intrinsic value of the metal of which it was composed;" whereby divers great evils resulted to the republic, as is recited in the said decree, and as may be discerned upon consideration of the subject matter itself.

That in view of the premises, a decree was passed by the supreme government, of date aforesaid, ordering and enforcing the surrender of all such copper coin to the said government, and suppressing the circulation thereof within the term of thirty days in the department of Mexico, and sixty days after the publication of the decree throughout the republic of Mexico, and providing for the issue of a new coin, in which the holders of the said original copper coin were, by the terms of the said decree, to be repaid in six months after the deposits made by them respectively.

And thereafter, to wit, on the 6th day of December, in the same

year, 1841, a further decree was made by the said government, providing and declaring, amongst other things, that all the real estate of the republic, (bienes raices) throughout all its territory, were pledged and mortgaged for the satisfaction of the debt so as aforesaid created and to be created to the holders of the copper bonds.

And thereafter, on the 9th day of December, 1843, a further decree in the premises was passed by the said government, whereby it was expressly declared that the value or proceeds of all the vacant lands of the republic, not "*Fronterizos*," and not theretofore pledged by some other obligation, were thereby dedicated and applied to the payment of the credits caused by the suppression of the copper money. Which said excepted "*Fronterizos*" lands were such as lay immediately upon the boundaries of the republic, within one league, and were by the general laws and policy thereof not the subject of sale.

And your petitioner has ready to produce and prove before your honorable court, true and authentic copies of the said decree when and where your honorable court may direct; and meantime he exhibits herewith, marked Nos 2, 3, and 4, true translations of so much thereof as relates to this claim, which he prays may be taken as part of this petition, Your petitioner humbly submits, that by these several decrees there was operated in his favor a complete and perfect mortgage, hypothecation, and pledge of all the vacant lands of the republic of Mexico which were the subject of sale, and of all the value and proceeds of such lands; which said mortgage, hypothecation, and pledge was in full force at the time of the cession and alienation of such lands by Mexico to the United States, and is still in such full force and virtue.

Your petitioner further shows, that on or about the 30th day of December, in the year 1853, a certain treaty was entered into at the city of Mexico, between the United States and the republic of Mexico, but subject to the ratification of the said governments respectively, whereby it was, amongst other things, agreed and provided that a certain large extent of territory of the said republic of Mexico should be ceded to the United States in proprietary right as well as in sovereignty, the whole of the said ceded territory being composed of the same vacant lands of the republic of Mexico, which lands, and the value and proceeds thereof, were so as aforesaid mortgaged, hypothecated, and pledged to your orator. For which said cession of the said lands, and for the other considerations in the said original treaty of the 30th of December, 1853, mentioned, the negotiator of the United States agreed that the United States should pay to the republic of Mexico the sum of twenty millions of dollars, ($20,000,000.)

That the said treaty, coming on to be considered by the President and Senate of the United States, and being actually pending and under consideration before the said Senate, and not having been acted upon or approved by them, your petitioner, being advised that some treaty of cession of lands in which he was interested in the republic of Mexico, (but not being certainly advised of the nature thereof,) was pending before the said Senate, did, on the 7th day of April, in the year 1854, cause to be presented to the said Senate a memorial and formal notice, setting forth the existence of the claim now presented

to the judgment of your honorable court, and warning the government and people of the United States that the lands so as aforesaid proposed to be ceded to the United States in proprietary right and in sovereignty, and the value and proceeds thereof, were bound by the decrees aforesaid for the claim of your petitioner, to the end that the said United States might protect themselves in the premises by such proceedings as, being clearly within their power and competency under the circumstances, should protect them from loss or injury.

And your petitioner herewith exhibits a copy of the said memorial and notice, marked No. 5.

It would appear from an endorsement upon the said memorial and notice that the same was referred to a committee of the Senate, and was reported with a recommendation that the same should be returned to the attorney and legal representative of your petitioner; but, in fact, no action whatever was taken by the Senate upon such recommendation; and your petitioner recently, to wit, on the 16th August, 1856, having applied for a copy of the said paper for the purposes of this petition, received, by a resolution of the Senate, (as he is informed,) the original paper, a receipt and copy being demanded and received at his hands, to be retained in the archives of the Senate.

And after the receipt of the said memorial and notice by the said Senate, the said original treaty was disapproved and rejected by the said Senate, and certain amendments were made to the said original treaty; and, amongst other things, the original purchase money and indemnity of twenty millions of dollars was reduced to ten millions of dollars; and the said treaty was finally ratified and confirmed by the two governments, and the ratifications thereof exchanged, as the same appears in the Statutes at Large of the United States, vol. 10, p. 1031.

And on or about the 20th day of June, 1854, your petitioner, by his attorney in fact, caused to be presented to the President of the United States a further notice in the premises, of which a true copy (omitting the exhibits which are sufficiently indicated therein, and are otherwise exhibited with this petition) is herewith shown to the court, marked No. 6.

To this last-mentioned paper your petitioner received no reply; but recently, to wit, in the present month of November, for the purposes of the present petition, he applied to the Department of State for some recognition thereof, and received the letter of which a true copy is herewith exhibited, marked No. 7.

Your petitioner shows that he cannot, in the nature of things, be certified whether the United States government has taken measures to protect itself in the premises. He has stated all he knows in that behalf, and can only draw his own inferences and conclusions, which would be of no value or effect with this honorable court. But he submits that, as to his rights in the premises, it is wholly immaterial whether, in point of fact, the government of the United States has or not availed itself of the notice and information so as aforesaid communicated to it; and that such notice was not necessary to be given in order to secure his said rights.

Your petitioner submits that by the said treaty, as finally ratified,

the government of the United States acquired the proprietary right in upwards of 49,000,000 (forty-nine millions) of acres of land, every acre of which was and is, in law and equity, mortgaged and bound for the claim here now presented, as were and are the proceeds and purchase-moneys of the same in the hands of the United States at the time and times of the memorials and notices aforesaid.

Your petitioner avers that he hath no adequate and sufficient recourse against the government of Mexico in the premises. That the said government is unable to satisfy its debts by reason of internal convulsions, and was so at the time of the treaty aforesaid, and that there are no remaining lands out of which he can have satisfaction in the premises. But further he shows and submits, in matter of law, that it is wholly immaterial whether these facts be as he alleges or not, since, as he is advised, and therefore alleges, for reasons of law which will be apparent to this honorable court, he is entitled to his recourse against the United States in the premises, and is not to be turned over to the indefinite pursuit of his debtor in parts foreign to the jurisdiction of this honorable court.

Your petitioner stands ready to maintain and prove all and singular his allegations in the premises.

He states that he has hereinbefore set forth all the action of the government of the United States upon this claim of which he has any knowledge; and that in respect of his own claim, herewith exhibited, no other person or persons is or are interested therein, but that the same belongs to him exclusively.

He prays that an order to take testimony, if required, may be passed, and that a bill may be decreed for his relief, and for the relief of his constituents in similar claims, which he has ready to prove by the production of the bonds when and where may be required.

CHARLES A. DUBOIS DE LUCHET,
Claimant.

GEORGE E. BADGER,
J. M. CARLISLE,
Attorneys, and of Counsel.

DISTRICT OF COLUMBIA, *Washington County, sct:*

Personally appears Charles A. Dubois De Luchet, the above-named claimant, and makes oath that the matters of fact stated in the aforegoing petition are true to the best of his knowledge and belief.

Sworn to before me a justice of the peace.

CHARLES WALTER,
Justice of the Peace.

Claim of Dubois de Lucket.

EXHIBIT NO. 1.

Decree of the 24th of November, 1841.

DEPARTMENT OF THE TREASURY, SECTION 4.

His Excellency the Provisional President of the Republic has thought proper to issue the following decree:

Antonio Lopez de Santa Anna, General of Division, worthy of the dignity bestowed by his country, and Provisional President of the Mexican republic, to all its inhabitants —

KNOW YE: Considering that some measures of former administrations have given rise to the circulation of an enormous quantity of copper coin, which is counterfeited, its market value lessened, establishing a pernicious fluctuation for commerce and the public in all mercantile transactions, which money not representing a fixed and positive value, articles of commerce of prime necessity for life have not had such value; that such serious evils cannot be avoided while there circulates a coin of imaginary value very much above the intrinsic value of the metal of which it is made, and whose type has been reduced to nullity by the erring tendencies of the laws of the 17th of January, and of the 8th of March, of 1837; that whatever precautionary and penal measures have been dictated by the government to avoid the falsifying of said money, they have been set at naught by the interest of the coiners, and by the facilities the above-cited laws lend to such criminal abuses; that the request is general from all the inhabitants of the republic for a prompt, energetic, and decisive measure to check the progress of this national calamity, although to accomplish it some private fortunes should suffer some detriment; that in my opinion any means whatever are preferable that will preserve the sacred right of property, respecting the value given by a law to circulating copper coin, although it has led to the most scandalous forgeries.

And finally, that the people have deposited in me as Chief of the Nation, an unbounded confidence that I may go beyond ordinary measures in extraordinary cases, to save the republic in great dangers, such as threaten her tranquillity and repose, as represented by the authorities in the present crisis, the free press, and all organs of opinion, according to the license granted me by the bases adopted in Tacubaya, and confirmed by the representatives of the departments, I have decreed:

ART. 1. There shall be issued a new coin, in eighths of a *real*, each weighing half an ounce. On the obverse the effigy of liberty; on the reverse a civic crown, expressing in the centre the value of the money. On the edge of the money shall be read, Republic of Mexico.

ART. 2. The secular and regular clergy, the associations, and arch-associations, and the tribunals of wills, chaplaincies, and pious works shall immediately pay the departmental treasuries, administrators of

rents, treasurer's office, or sub-treasurer's, all the copper coin they possess.

ART. 3. The sums which they deposit shall be repaid with the new coin *six months* after the deposits have been received, unless the parties interested make some other agreement with the government.

ART. 4. In the same offices will be received all the copper coin which individuals may deposit under the same guarantees.

ART. 5. All the copper sheets will be received which may be given to the government, and its value paid at the current price with the same money it is about to issue, or by other means stipulated with the government.

ART. 6. Should there be in the mint a sufficient quantity of the new coin, it will certify the redintegration, according to the order of the deposits, of which the former articles speak; and that which may belong to the government shall be remitted to the general treasury for the payments which may have to be made in the said office.

ART. 7. The copper coin which is to be suppressed in virtue of this decree, it shall not circulate as money more than *thirty days* after its publication in the department of Mexico, and sixty days after it is published in the rest of the republic. Beyond this limit the holders will not have the right of indemnification for having refused to take advantage of the benefits promised in the third and fourth articles of this decree, although it is to be hoped that those interested, for the public good as well as their own, will aid these government measures.

ART. 8. The fines imposed by the laws for the punishment of false coiners shall be vigilantly continued, and also the order established to set on foot and carry on the prosecutions.

Wherefore, I order this to be printed, published, circulated, and carried into due effect. National Palace, in Mexico, 24th of November, 1841.

ANTONIO LOPEZ DE SANTA ANNA.

By order of his Excellency.

Y. TRIGUEROS,

Secretary of the Treasury

And I communicate it to you for your instruction and the consequent effects. GOD AND LIBERTY. Mexico, Nov. 24, 1841.

TRIGUEROS.

EXHIBIT No. 2.

Decree of December 6, 1841.

TREASURY DEPARTMENT, SECOND SECTION.

His excellency the provisional President has been pleased to direct to me the following decree:

The citizen Antonio Lopez de Santa Anna, *bene merito* of the country,

general of division, and provisional President of the republic of Mexico, to the inhabitants thereof: Know ye—

That making use of the faculties conceeded to me in the seventh of the bases adopted at Tacubaya, and sworn to by the representatives of the departments, I have thought proper to decree the following:

ARTICLE 1. On the day following the publication of this decree at the respective places, the national bank of liquidation, and all of its agents, sub-agents, attorneys, or commissioners, or whatsoever class they may be, shall cease in their functions.

ARTICLE 2. Of the funds which were adjudged to the bank, by the decrees of the 17th of January, and the 18th of April, 1837; 27th January, 1838; and the 16th and 18th February, 1839, there are dedicated especially to the liquidation of the copper money, and to the payment of the charges to which are subjected the funds consigned to the said bank, according to said decrees, and that of the 20th January, 1837—

1st. All the real estate of national property which may exist in all the territory of the republic—the decree of the 4th April, 1837, in respect of of the colonization of lands of this class being annulled, so far as it is inconsistent with the present decree.

2d. All the active credits of the exchequer which may not have been recovered to this date, be their nature or locality what they may, excepting the proceeds of maritime duties.

3d. The new money which may be coined, and to be substituted for the old, and all the metal and materials which remained useless through the suspension of the coining of copper money, prescribed on the 17th January, 1837, and through the funding of that which was put in liquidation.

4th. All the amount of the pecuniary penalties which the laws establish in respect of forgers and counterfeiters, and which may be realized against those who may be detected.

5th. The free surplus of the temporal goods of the ex-Jesuits, and of the extinguished inquisition, the lawful charges by which they are affected being satisfied.

6th. The temporal goods of the uncloistered religious societies, excepting such as are destined to and subserving some public beneficence.

7th. The funds in bankruptcy which have escheated.

8th. The mortgage which is offered to the Supreme Government by the eclesiastical authority and the religious communities, in such part as has not been made use of by the government in the form prescribed in the articles 4th, 5th, and 6th, of the said decree of January 27, 1838.

9th. &c. &c., * * * * * * * * *

Wherefore, I command that this be printed and circulated, and receive due fulfilment.

Palace of the general government, in Mexico, December 6, 1841.

ANTONIO LOPEZ DE SANTA ANNA.

F. TRIGUEROS,
Secretary of the Treasury.

EXHIBIT No. 3.

Decree augmenting the funds for the suppression of copper money, December 9, 1843.

His excellency the provisional President has thought fit to issue the following decree:

Valentine Canalizo, General of Division, and provisional President of the Mexican republic, to all its inhabitants:

BE IT KNOWN, That in consideration of the difficulties incident to the imposition of taxes; that they cannot henceforward yield the uses and advantages proposed at the time they were decreed; that some of the assignments made to liquidate the debts caused by the suppression of copper money of this class, it is necessary to accelerate the redintegration of these creditors, the supreme provisional government, faithful to the purpose of accumulating funds, which, besides giving a further guarantee, may facilitate payment to the parties interested, and to the end that these may be indemnified as far as possible for the delay which they are yet to suffer in being reimbursed, and to remove the obstacles which are now paralyzing this reimbursement, has been pleased to grant, in council of ministers, making use of the ample faculties with which he finds himself invested, the following:

ARTICLE 1. There is hereby applied to the payment of the credits caused by the liquidation of the copper money the value of the vacant lands not *fronterizos*, (within one league of the frontier,) nor bound by any other obligation.

ARTICLE 2. In order to give effect to the disposition in the aforegoing article, immediate measures shall be taken to regulate the alienation of the lands, &c., &c.

EXHIBIT No. 4,

(Confidential.)

THIRTY-THIRD CONGRESS, SEPTEMBER 1—EX.

April 10, 1854. Referred to the Committee on Foreign Relations. April 13. Reported with the recommendation that it be returned to the said attorney

Memorial of Charles Dubois de Luchet, in behalf of himself and others, by J. M. Carlisle, his attorney in fact.

To the honorable the Senate of the United States:

The memorial of Charles Dubois de Luchet, a subject of his imperial majesty, the Emperor of the French, in behalf of himself and all others similarly situated in respect of the matter hereinafter set forth, respectfully represents:

That your memorialist is the holder and *bona fide* owner, for full and valuable consideration, of certain bonds of the Government of the Republic of Mexico, hereinafter more particularly described, amounting, with interest, to the sum of eight hundred and sixteen thousand five hundred and fifty-four dollars and seventy-three cents, ($816,554.73.)

That your memorialist has knowledge of the fact, and now gives notice thereof, for the protection of those interested, that there are divers other French subjects, and subjects of other powers in amity with the United States, who are in like manner holders of similar bonds, for full and valuable consideration, and *bona fide*, to a large amount, which he has not now the means of stating with exactness, but which he has reason to believe is not less than several millions of dollars. And for the precise amount of all such bonds your memorialist respectfully refers your honorable body and the Government of the United States to the public records of the Government of the said republic of Mexico, and to all other sources of certain knowledge and information in the premises which the subject matter, as hereinafter set forth, necessarily and with sufficient certainty, indicates and implies; at the same time, for himself, averring that the true amount of his own rights and interests in the premises is as hereinbefore stated.

Your memorialist further shows, that the said bonds represent a certain national debt of the said republic of Mexico, created by the government thereof, in pursuance of a certain decree dated the 24th day of November, A. D. 1841, a copy of which, in the original Spanish, together with a translation thereof, he exhibits herewith, marked Nos. 1 and 2; and which said national debt is further secured by a certain other decree of the said government, bearing date the 9th day of December A. D. 1843, a copy of which, in the original Spanish, together with a translation thereof, he herewith exhibits, marked Nos. 3 and 4.

Your memorialist further shows, as will clearly appear from the said exhibits, that the said debt was created by the said government, (his Serene Highness General Don Antonio Lopez de Santa Anna, being then, as now, at the head thereof,) in the execution of a wise and necessary public measure, to wit, the withdrawal from circulation in said republic of a certain copper coin, or money, for the reasons and in the manner set forth in eaid exhibits Nos. 1 and 2.

That your orator was at the date of the said decree of November, 1841, and until after the ratification of the treaty of Guadalupe Hidalgo, a resident, for commercial purposes, in the city of Mexico, and largely engaged in financial and commercial concerns: and relying on the faith of the said Government, and particularly on the terms and conditions of the said decree of December, 1843, became, to the extent hereinbefore mentioned, the creditor of the said government in the premises. That, by the terms of the said decrees, and especially the said last mentioned decrees, (Nos. 3 and 4,) as well as by the terms of an intermediate decree, of which he has no copy, and which, therefore, he cannot herewith exhibit, the said government expressly and solemnly pledged, hypothecated, and mortgaged, for the satisfaction of the said "copper money-debt," all the public lands of the said republic of Mexico, and the proceeds thereof, which were subject to be granted and sold—the "frontier lands," "*terrenos fronterizos*," (that is to say, the lands within a certain distance of the frontier specified by the laws of Mexico,) not being subject to be granted and sold, and being therefore excepted from said mortgage.

He further shows, that the lands theretofore acquired by the

United States from Mexico, under the treaty of Guadalupe Hidalgo, were subject to the said mortgage, and in equity and conscience liable for the satisfaction of the said debt; and your memorialist, after the said treaty had been finally ratified by the contracting parties, and promulgated to the world, came to the city of Washington and consulted with counsel touching the enforcing of such right by petition to the Congress of the United States; but he was advised by his counsel that, forasmuch as he had not given notice to the United States of the said incumbrance before the celebration of the said treaty, and forasmuch as the United States had then come under a solemn obligation to pay to Mexico the amount stated in said treaty, and forasmuch as the said mortgage remained binding upon other lands of the said republic of Mexico sufficient to satisfy the same, and forasmuch as it would be an offence to the said republic, under the circumstances, to refuse to make the payments stipulated by the said treaty, it would be fruitless to present the said claim to the government of the United States. And from this advice alone, your memorialist refrained from presenting this claim at that period. But being at Paris, representing to the imperial government the facts and legal rights hereinbefore set forth, he has now recently become aware of the fact that there is pending before your honorable body a treaty with Mexico for the cession of certain other public lands of the said republic to the United States for a large sum of money; which said lands and the proceeds thereof are, by the solemn and public acts of the said republic of Mexico, expressly pledged and mortgaged for the satisfaction of the "copper money debt" aforesaid, to your memorialist, and to all others in like manner creditors on the said special debt.

Your memorialist is advised, that if the government of the United States shall accept the cession of the said lands, with notice of the said mortgage before the ratification of the treaty therefor, there will not only be a clear, absolute, legal right, but a right binding in conscience, and upon the most liberal principles of fair dealing, whether between nations or individuals, to all the creditors upon the said mortgage-debt, to claim of the United States the satisfaction thereof; and that it will be for the United States to require reimbursement and satisfaction from Mexico in the premises.

Your memorialist, therefore, now by these presents formally gives the government and people of the United States to know and be informed that the mortgage and pledge aforesaid rests upon the lands of Mexico, which are proposed to be ceded by the said republic to the United States, in and by the treaty now pending before your honorable body for ratification; and that he, your memorialist, will claim, and all other persons in like case will claim, of the United States full and complete satisfaction and indemnity for the full value of the debt and interest due and accruing to him and them respectively in the premises to the extent of the value of the said lands, or the consideration which may be stipulated to be paid therefor, if the said lands shall be ceded to and accepted by the United States; not doubting, but confidently trusting that the government of the United States, after such notice, will hold itself ready to discharge such mortgage fully and equitably on demand.

Your memorialist prays that this memorial, or so much thereof as may be necessary to affect the government and people of the United States with notice of the mortgage in question, may by the action of your august body be so filed, recorded, and disposed as may give effect to its intent and purpose as herein before expressed.

And your memorialist will ever pray, &c.

CHARLES DUBOIS DE LUCHET,
By J. M. CARLISLE, *His Attorney in fact.*

WASHINGTON, *7th April*, 1854.

EXHIBIT No. 5.

To his Excellency, FRANKLIN PIERCE,
President of the United States:

The memorial of Charles Dubois de Luchet, a subject of his imperial majesty, the Emperor of the French, respectfully represents: That your memorialist is the holder and owner for full and valuable consideration of certain bonds of the republic of Mexico, a schedule of which is hereunto annexed, and which with the interest thereof, calculated to the month of July, in the current year, (1854,) amount to the sum of eight hundred and sixteen thousand five hundred and fifty-four dollars and seventy-three cents, ($816,554 73,) which said bonds he holds ready to be produced and exhibited as may be necessary to the ends hereinafter set forth.

He further shows that said bonds are, by decree of the supreme government of the republic of Mexico, charged and secured by mortgages upon all the vacant lands of the said republic not within the distance of one league from the frontiers thereof; and are by the express terms of the said decree a lien and charge not only upon the said lands specifically, but upon the value and proceeds thereof, from the date of the said decree; that is to say, on and after the ninth day of December, in the year eighteen hundred and forty-three, (9th Dec., 1843.) Your memorialist herewith exhibits a translation of the articles of said last-mentioned decree creating said lien and mortgage; and also a translation of the decree under which the said debt was created, and he will in due time present and exhibit duly authenticated exemplifications of the said decrees of whose existence and effect he humbly prays your Excellency in the meantime to take notice.

Your memorialist, in virtue of the premises, respectfully gives your Excellency and the government of the United States to understand and be informed that the said debt is a lien and charge upon the lands which may be ceded to the United States, by the pending treaty with the said republic of Mexico, and upon the value and proceeds of such cession in the hands of the United States; and he prays your Excellency and the government of the United States, that in the consummation of the said treaty, if the same shall become a compact between the two nations, such measures may be taken as will secure the discharge of the said mortgage, to the extent to which this notice may be in conscience binding, out of the amount which the government of the United States

may in and by said treaty stipulate to pay to the said republic of Mexico. And he respectfully gives notice to your Excellency and to the government of the United States, that he will claim of the government of the United States the amount and value of said bonds, if the cession of the said lands be accepted from the said republic of Mexico ; as in conscience and equity he may rightfully do after notice, which will enable the government of the United States to protect itself from loss in the premises.

Your memorialist further states, that pending the consideration of the treaty commonly called " the Gadsden treaty" before the Senate of the United States, and before it was suposed that the same had been acted on, your memorialist presented to the Senate a paper setting forth the same facts which are hereinbefore expressed; to the end that, if it were deemed expedient, such measures might be taken as would enable the government of the United States to do justice without any risk of loss in the premises.

He further shows that the lands ceded to the United States by the treaty of Guadalupe Hidalgo were in like manner pledged for the payment of the said debt; and that by reason of his failure to give notice pending the negotiation, or before the ratification of said treaty, as he supposed and was advised, he lost his right to assert as against the government of the United States his aforesaid lien. But having given such timely notice in the present instance, he trusts that his said lien will be respected, and that the government of the United States will retain out of the proceeds and consideration of the said contemplated cession of lands, (if the same shall be made and accepted,) such sum as will satisfy and discharge the same.

Your memorialist is aware that his present application can only appeal to the magnanimity and sense of justice of the United States ; but in these he confidently trusts, not doubting that equal effect will be given to the obligations of equity and good conscience, as if the case were between private parties, and subject to ordinary jurisdictions.

Praying that this caveat and claim may be admitted and have effect until such time as (if it be deemed necessary) he may have the same formally brought to the consideration and action of the United States through his own government.

Your memorialist will ever pray, &c., &c.

CH. DUBOIS DE LUCHET,
By J. M. CARLISLE,
His Attorney in fact.

WASHINGTON, *June* 20, 1854.

EXHIBIT No. 6.

DEPARTMENT OF STATE,
Washington, November 21, 1856.

SIR : The memorial addressed on your behalf to the President, bearing date June 20, 1854, claiming a lien on the lands ceded to the

United States by the Mexican government, was duly received, and by him referred to this Department.

In reply, I have to acquaint you that this claim is not considered to have any foundation in law or equity.

I am, sir, your obedient servant,

W. L. MARCY.

To CHARLES DUBOIS DE LUCHET.

EXHIBIT No. 1 A.

Claim of Dubois de Luchet.

The claim of the petitioner, in his own right, is for the principal sums of the copper bonds held by him of his own property, and interest thereon; the said copper bonds bearing the number following, to wit:

No. 74	No. 550	No. 118	No. 1441	No. 637	No. 1437	No. 1003	No. 1267
76	895	119	1820	641	1806	1012	1696
78	907	122	1454	642	1440	1014	1294
81	908	123	1900	643	1813	1017	1699
89	970	158	1503	644	1443	1018	1439
90	971	282	1903	645	1899	1019	1808
91	972	283	1508	646	1502	1091	1442
92	975	284	1974	647	1902	1092	1898
93	996	285	1526	648	1507	1093	1483
94	997	512	2187	649	1973	1094	1901
95	998	515	2249	711	1510	1095	1504
516	999	1260	2252	724	1976	1096	1904
535	96	1556	2255	752	2188	1151	1509
536	100	1263	400	894	2250	1153	1975
537	101	1565	238	1529	2253	1154	1528
538	103	1266	570	1262	2272	1176	2189
544	104	1633	572	1558	416	1259	2251
545	109	1269	632	1265	239	1261	2254
547	110	1698	633	1632	1000	1557	2273
548	111	1438	634	1268	1001	1264	653
549	117	1807	635	1697	1002	1625	240

IN THE COURT OF CLAIMS.

ON THE PETITION OF CHARLES A. DUBOIS DE LUCHET, A SUBJECT OF THE EMPEROR OF FRANCE.

Brief of the Solicitor of the United States.

The petitioner alleges that he is the holder of Mexican bonds, known as copper bonds, to the amount of $850,000, and that to secure these and other bonds of the same character which are held by other parties, supposed to amount to seven or eight millions, two decrees were made, one by President Santa Anna, dated 6th December, 1841, and the other by President Canalizo, dated 9th December, 1843, by which, in effect, all the public land then belonging to Mexico lying in the present State of California and the Territories of New Mexico and Arizonia, were mortgaged to the holders of said bonds to secure the payment thereof, and that said lands have passed to the United States,

especially those lying within the Gadsden purchase under the treaty of December 30, 1853, subject to the lien of said mortgage, because the United States had notice of the mortgage before that purchase was consummated. And the petitioner exhibits translations of said decrees, and of copies of his memorials to the Senate and President, communicating the fact of their existence prior to the conclusion of said last mentioned treaty.

The questions to be decided now are, (1) what is the legal effect of the decrees, copies of which are exhibited as part of the case? Do those documents pledge the lands for the payment of these bonds, and create a specific lien upon the soil for that object, or do they merely pledge the *faith of the Mexican government* that the money which may be received on the sale of the lands shall be applied to the payment of the copper bonds? and (2) if the decrees are construed to mortgage the lands, has the United States by the purchase from Mexico become liable to pay the debt of Mexico for which the soil was mortgaged.

I. If the decrees pledge nothing but the *faith* of Mexico, it is not contended that the United States are bound to compel that government to keep her faith with French subjects. It is only upon the construction that they pledge the *lands* that the claim is thought to be maintainable by the petitioner's counsel.

I shall contend, first, that the decrees do not import a mortgage of the lands, and second, if they do, the United States has not assumed the debt of Mexico to the petitioner.

The first article of the translation furnished by the petitioner of the decree of 1843, is in these words: "That there is hereby applied to the payment of the credits caused by the liquidation of the copper money, *the value* of the vacant lands not ponterizos, (within one league of the frontier,) nor bound by any other obligation."

The decree of 1841, after discontinuing in the first article the national bank of liquidation, proceeds to declare, in the second article, as translated, as follows: "Of the funds which were adjudged the bank, by the decrees of the 17th January and 18th April, 1837, 27th January, 1838, and 16th and 18th February, 1839, there are dedicated especially to the liquidation of the copper money and to the payment of the charges to which are subjected the funds consigned to the said bank according to the said decrees and that of the 20th January, 1837, 1st all the real estate of national property which may exist in all the territories of the republic," &c.

It is on this language of these decrees that the claimant rests his case. But this language does not convey the meaning for which he contends. That quoted from the decree of 1843 says "that there is hereby applied (appropriated) to the payment of the credits caused by the liquidation of the copper money, for which these lands were *afterwards* given,) *the value* (the proceeds) of the vacant lands," &c. This is not a pledge of the lands themselves. It is but an appropriation of the receipts from them, and is as different from a mortgage of the lands as an agreement to pay over the amount expected to be received from the sale of a horse would be from a pledge of the horse itself. The language quoted from the decree of 1841 dedicates certain *funds*, which

by previous decrees had been adjudged to the bank, to the "liquidation of the copper *money*, and to the payment of the charges to which are subjected the funds consigned to the said bank *according to the said decrees* and that of the 20th July, 1837." Six decrees are here referred to as explanatory of the nature of the "*funds*" which had been previously consigned to the bank, and which are by this decree appropriated to the liquidation of the *copper* coin and of the *charges* to which those decrees subjected these funds, which decrees are not before us. It is plain, however, from the decree before us, that those decrees dedicated what, in the decree of 1841, are called "funds," to certain specified objects, for which objects that decree substituted the copper bonds, and that if the things called "*funds*" were mortgaged to the copper bond holders by the decree of 1841, they had been mortgaged to the bank for some other creditors by the previous decrees. Can we suppose that even the government of Mexico would attempt to deal in this wise with mortgages of lands—revoking them at pleasure? I quite agree with the claimant's counsel that transactions relating to proprietary interests are to be construed on the same principles, whether the dealings be by governments or individuals, and in the absence of any authority to the contrary, that will be assumed to be the rule in Mexico as well as in the United States. This renders it impossible to suppose that the "*funds*" which, by the decrees of 1837 and 1838, had been dedicated to one object, and by that of 1841 to another, were lands; and that the first decrees were intended to make a mortgage, and the last to revoke that mortgage, and create another for a different object. It may be observed in this connexion, also, that if the decree of 1841, which was issued simultaneously with that for the suppression of the copper money, mortgaged the lands to liquidate the *copper money*, that of 1843 revoked that mortgage, and dedicated merely the *value* or the *receipts* from the lands to the payment of the bonds which had since been given for the *money suppressed* by the former decree. This last decree fixes the rights of the claimant, both because he cannot contest the power of the Mexican government to modify or change its dedications of these "*funds*," seeing that he claims under a decree which purports to change the pledge of these funds from other creditors to that of the liquidation of the copper *money*, and because he is but a copper *bond* holder, and therefore not embraced in the decree of 1841, which did not apply to those who should take bonds for the *copper money* suppressed by Santa Anna's decree of 1841. The decree of 1843 includes only those who accepted the bonds for copper money suppressed, and the extent of their rights on the lands depends on the terms of that decree. These terms cannot be construed as mortgaging the land. They direct the application to the payment of these bonds, the *value* of the lands, and the word "*value*," it is admitted by the claimant himself, (see his petition, p. 2,) means the "*proceeds*" of the lands.

The decree of 1841, therefore, is alone relied on as creating a mortgage on the lands. If the language of that decree, by which certain "funds" are *dedicated* to the liquidation of the *copper money*, could be construed to create a lien on lands, the claimant could have no ad-

vantage of such lien, for he does not describe himself as the possessor of any of the copper *money* which was to be liquidated by those "funds," but only as the holder of the bonds given for some of that money, and which are secured by the subsequent decree dated 8th December, 1843. But it is apparent from the terms used in the decree of 1841, from the nature of the transaction, and from the character of the parties to it, that no lien on the land was given by the decree of 1841 more than by those which preceded it in 1837 and 1838, or by that which followed it in 1843. The only foundation for such an idea consists in this, that the decree under consideration enumerates "the real estate" as one of the items of the "funds" which had been previously adjudged to the bank for certain purposes, but which are by that decree to be applied "*to the liquidation of the copper money.*" Lands might be mortgaged by the description of "funds," perhaps, if the context made it clear that it was so intended. But this word means ordinarily money, and the context shows that it holds that meaning in this place, because a debt is to be liquidated with it. But it is said the real estate is enumerated as an item, and the first item, of the funds with which this liquidation is to be made. So are "all the active credits of the exchequer which may not have been recovered to this date, be their nature and locality what they may, excepting the proceeds of maritime duties." But it was not meant by this, to tender to the holders of the copper money the land, or portions of it, or "the credits of the exchequer," in payment of their debt. It was the proceeds in money of the lands and of other items mentioned in the decree which were to be applied to the liquidation of the copper money. It was not the lands or "the credits of the exchequer," &c., which were to be applied; but it was the funds which were to be obtained from these sources which were to be applied, according to this decree, to the liquidation of the copper money. And this, the obvious meaning of the language of the decree, is in keeping with the *character of the transaction, and of the parties to it.* Would any one believe that a government would mortgage its public domain of all and singular to men, women, and children, who should have the copper pennies in circulation? Was there ever a precedent for such a transaction, and what would be the advantage to the individuals of such a lien? It could never be enforced by foreclosure at the suit of any or all the holders of the coin, nor could a purchaser of the land thus mortgaged control the government, and compel it to apply the proceeds to the discharge of the mortgaged premises. Nor could a purchaser of part of the land, even if the purchase money paid by him was faithfully applied, get a release from such mortgagees; therefore, practically, it could be but a pledge of the faith of the nation to apply the proceeds of these sales, specially, whatever might be the form of words used, and this circumstance, with the unprecedented nature of any other sort of pledge by a nation, would control the construction of the words, even if they might be construed to create a mortgage of the lands. It is a common case for a nation desiring to give credit to its securities to pledge special branches of its revenue, and we have a recent instance in our history of the pledge of the proceeds of the sales of the public lands. (See

act of 28th January, 1847, § 20, 9 Stat., p. 128.) But such acts are but pledges of the faith and honor of the nation, that the particular source of revenue mentioned shall be devoted to the payment of the debt named. No one ever supposed that such pledges created a lien on the lands sold, or other property, whence the revenue was derived, or gave the holder of the securities any claim against such land or property, or required the purchaser or tax payer to look to the application of his payments in order that his property might be exonerated from further claim, as in a case of property mortgaged, or conveyed in trust and charged with the payment of special debts. As already stated, such pledges are similar to the promise of an individual to pay a debt from the proceeds of an expected sale. If the man owns the property thus pointed to, and has the prospect of making a sale of it, and is an honorable man, the paper offered is likely to be in good credit, even if his general credit was impaired, and yet he might fail to keep the promise, and put the *price* of the horse or other article sold, in his pocket, and the purchaser of the horse or other article could not be disturbed by the disappointed creditor.

II. But if it be assumed that the decrees operate to mortgage the lands, part of which is included in the territory since acquired by the United States, it does not follow that such acquisition devolves upon the United States the obligation to pay the debts of Mexico which were secured by a lien on these lands. I do not deny this obligation on the ground that the United States were not notified of the lien, or that the lien was extinguished by the cession. On the contrary, I admit that if the land was mortgaged by these decrees, we took the grant not only of the Gadsden purchase, but of that made at Gaudalupe Hidalgo, subject to the lien; because the decrees, being the acts or laws of the sovereign power, were binding on all subsequent purchasers, whether such purchaser was an individual or a State, to which the sovereignty was transferred as well as the land, This is the public law, and it is expressly recognized in both the treaties, (see 9 Stat., pp. 929, 930, 934, and 935; 10 ib., p 1,035,) where it is provided that all private rights in these lands, which had been acquired under Mexico prior to the cession of these territories, shall be respected by the United States. Assuming, then, that the petitioner has a mortgage on all the lands of California, New Mexico, and Arizonia, which were public in December, 1841, which is good against all private persons who have since acquired titles thereon, and also against the United States, is there anything in the contracts by which Mexico has subsequently granted parts of these lands to individuals and to the United States which would create an obligation on the part of such grantees to pay the copper bond debts of Mexico? Nothing of the sort will be pretended. These grants do not differ from the ordinary case of a grant of land subject to encumbrance, which, while it reduces the estate granted to an equity of redemption, give the mortgagee no claim whatever on the grantee, with whom he has no contract. It is agreed that there is no different rule applicable to the relations of a State to a mere property interest and those of individuals to such an interest; and, therefore, there is no different right in this supposed mortgagee against the United

States than he has against the multitudes who have grants from Mexico, in California, &c., since the date of these decrees, and most of the grants in California were made since those dates, and the greater part of the land, as respects value, I believe, was granted to individuals by Mexico.

But this suit proceeds on the assumption that by the mere acquisition of these territories from Mexico the United States has become liable to pay the debts for which certain lands were pledged, although in the greater part of those lands the United States claims no interest whatever, and does not claim an absolute interest in any which were pledged to the petitioner prior to the cession. If the court holds that the lands were mortgaged, then the United States acquired nothing but the equity of redemption on that portion of the mortgaged lands which had not been granted to individuals at the date of the treaty, because this government got nothing but the interest remaining in Mexico at the time. There is, therefore, not only no privity of contract with the mortgagees, but the United States have received no consideration from which such an undertaking to pay off the mortgage could be implied, and the mortgagees could, with equal propriety, sue any one of the individuals to whom Mexico had made grants of land in this territory, and claim of him the payment of the bonds of Mexico which had been secured by a lien on the lands he purchased as make the claim against the United States.

This is not a proceeding to foreclose a mortgage upon lands in which the United States claim an interest, but a demand of payment of the mortgage debt against a party who claims the equity of redemption in some undefined portion of the mortgaged premises. If it were a proceeding to foreclose, it might he objected that the original debtor and the other purchasers were not made parties, and that the lands in question were not described, and the question would arise whether the court has jurisdiction of such a case. No court can do justice without having all these parties before it; and this court could not entertain such a case. It has already decided that it could not. It is not necessary to consider again whether such a case could be entertained, as this is not a proceeding to foreclose, but a demand founded on the idea that the United States has assumed the obligations of Mexico.

M. BLAIR.

IN THE COURT OF CLAIMS.

DECEMBER 20, 1859.

DE LUCHET *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the court.

The petition alleges that the claimant is a subject of the Emperor of the French; that he is the holder and owner of bonds, commonly called copper bonds, against the Mexican government, to the amount, with interest, of $810,554 73; that there are other similar bonds—amounting, as he has reason to believe, to several millions of dollars—

held by other persons; and that, by certain decrees of the Mexican government, all the vacant lands of the republic of Mexico were mortgaged, in 1841 and 1843, to secure the payment of those bonds.

The petition further alleges that a treaty, on the 30th of December, 1853, between the United States and Mexico, was entered into in the city of Mexico, subject to the future ratification of the two governments, by which treaty Mexico ceded to the United States a large extent of the public lands of that republic, containing upwards of nine millions of acres; that whilst said treaty was pending in the Senate of the United States, the claimant, on the 7th of April, 1854, gave formal notice to the Senate of the existence of said claim, and that said lands were bound by said decrees for the payment thereof; that no action was taken by the Senate on the subject, and that the treaty was afterwards ratified and confirmed by the two governments, the purchase money being ten millions of dollars; that said lands are bound by said claim of the petitioner, as were the proceeds and purchase money of the same at the time of the notice aforesaid.

The claim now presented to this court is for the amount, with interest, of said Mexican bonds held by the petitioner.

This claim was brought to the consideration of the Secretary of State, whose decision on it is as follows:

"DEPARTMENT OF STATE,
Washington, November 21, 1856.

"SIR: The memorial addressed on your behalf to the President, bearing date June 20, 1854, claiming a lien on the lands ceded to the United States by the Mexican government, was duly received, and by him referred to this department.

"In reply, I have to acquaint you that this claim is not considered to have any foundation in law or equity.

"I am, sir, your obedient servant,

"W. L. MARCY.

"TO CHARLES DUBOIS DE LUCHET."

The foundation of the petitioner's claim, of having a lien on the lands aforesaid prior to and at the time of their cession to the United States, is two Mexican decrees. Among the exhibits in the cause are two papers purporting to be translations of those decrees; but there is no proof of their being correct translations. We have, however, found the decrees, as printed by authority of the Mexican government. One of them was issued by Santa Anna, provisional president of the republic of Mexico, and is dated December 6, 1841; the other was issued by Canalizo, provisional president of said republic, and is dated December 29, 1843.

Neither of those decrees contemplates a mortgage or lien on the lands to which they refer. The first one decrees that the real estate of national property shall be destined, (*se destinan*,) with various other public resources, to the liquidation of the copper money and to the payment of other specified charges. The second one decrees that there should be applied to the payment of the credits caused by the liquidation of the copper money, the value (*el valor*) of the vacant lands not *fronterizos*, nor bound by any other obligation.

The said decree of December 6, 1841, in the Spanish language, will be found in a volume called "Laws and Decrees" of Mexico, 1841, page 148. The other decree, of December 9, 1843, in the same language, will be found in "El Observador Judicial," vol. 4, page 495. These volumes are in the library of the Attorney General.

These decrees amount to nothing more than a pledge by the Mexican government that the proceeds of the sales of the public lands and other specified funds should be appropriated to the payment of the debts specified in the decrees.

The United States have paid to the Mexican government the consideration of said purchase, to wit, $10,000,000. It may be that the Mexican government, in consequence of said decrees, are bound to apply that purchase money to the payment of said bonds; but the United States can in no respect be responsible for the proper application of that purchase money by the Mexican government.

Our opinion is, that there is no foundation for this claim.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 248.

JOHN H. MERRILL.

MARCH 1, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JOHN H. MERRILL *vs.* THE UNITED STATES.

1. The petition of the claimant to the Court of Claims.
2. Claimant's petition to Congress, and resolution of the Senate referring the case to the Court of Claims, transmitted to the Senate.
3. Depositions and other documentary evidence filed by claimant, transmitted to the Senate.
4. Claimant's brief.
5. United States Solicitor's brief.
6. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court at Washington, this first day of March, A .D. 1860.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE COURT OF CLAIMS.

No. 1761.

JOHN H. MERRILL *vs.* THE UNITED STATES.

DISTRICT OF COLUMBIA, *Washington County, ss:*

On this 30th day of December, A. D. 1857, personally appeared before me, a justice of the peace within and for said county, John H. Merrill, late of San Francisco, California, now resident of said county, who, being duly sworn according to law, declares that one Edward A.

King was, on or about the 10th day of April, A. D. 1849, duly appointed (by Brevet Bennet Riley, a brigadier general in the United States army, and the then acting United States military governor of California) harbor-master of the port of San Francisco, and duly commissioned as such, under date of June 19, 1845, as will appear by the records of the War and Navy Departments; that there devolved upon him, in addition to the duties ordinarily appertaining to the office of harbor-master *duties*, the duties of boarding officer and surveyor of the port, and also the care of providing board, lodging, clothing, and medical attendance for sick, destitute, and disabled American seamen discharged from American vessels in that port; that the revenue laws of the United States were extended over California; that the American seamen arriving at that port of San Francisco were liable to the payment of, and did pay to the collector of the port, the hospital tax of twenty cents per month out of their wages; that there was at San Francisco no United States hospital, nor public institution for the succor and relief of such disabled seamen, nor any other provision made for that class of sufferers by the authorities of the United States; and said Merrill further states, that at that time he was in possession of the iron ship Antelope, said ship being moored at his wharf and used as a store ship and boarding house; that the said King agreed to and with the said Merrill, if he would undertake to receive and provide good and suitable board, medical attendance, and nursing for such destitute American seamen who had or should arrive in American vessels, that the government of the United States would see that he was paid, and that the money was already collected and would be promptly paid on the presentation of bills properly vouched for; and that before accepting the said King's orders, which are attached to this bill, he was assured by the collector of said port (Harrison) that the bills would be promptly paid; that in consequence of such assurances, he, the said Merrill, very much to his injury, did receive on board his ship above named one Mr. Stone, one Mr. Rogers, and Mr. John Hammond, to whom he furnished, collectively, ninety-six days' board and medical attendance; and that all the time they were in care of said Merrill they were entirely helpless, and required the entire time of two or three well men day and night; and that in consequence of giving relief to said sufferers, his business was entirely broken up by a rumor that there might be some infectious disease amongst the men; that able and skilful physicians were employed, who visited said persons two or three times daily, and for whose services two suits at law were instituted against the said Merrill, he being unable promptly to pay the same, but all of which he did pay at a great sacrifice to his interest, as on the presentation of said bills to the said King, he (King) said he was unable to pay the same, and that Governor Riley was not authorized to do so.

Board and medical attendance to Mr. Stone, 35 days, at eight dollars per day, from October 16 to November 25.....	$280 00
Board to Mr. Hammond, from October 29 to November 20, 23 days, at eight dollars per day.....	184 00

Board to Mr. Rogers, from October 13 to November 20, 38 days, at eight dollars per day..... $304 00

768 00

the price agreed on by Mr. King; that the said bill was duly presented in the month of November, 1849, but the same or any part thereof has not been paid. And the said Merrill further declares, that besides the bills of cost which he was forced to pay on account of the non-payment by the government of the above amount, he was forced to borrow money at the rate of six per cent. per month to pay his said indebtedness for medical and other attendance on said seamen, and that he has, therefore, charged interest at the rate of six per cent. for the two first years, and two per cent per month for the six years ensuing, making in interest the sum of two thousand ninety-one dollars and eighty-four cents, and a total of two thousand eight hundred and fifty-nine dollars and eighty-four cents, ($2,859 84.)

J. H. MERRILL.

Sworn and subscribed to before me the day and year aforesaid.

JOHN S. HOLLINGSHEAD, *J. P.*

IN THE COURT OF CLAIMS.

No. 1,761.

JOHN H. MERRILL *vs.* THE UNITED STATES.

Brief for the Petitioner.

To the honorable the Court of Claims:

This claim is for services rendered the municipal authorities at San Francisco, California, in the summer of 1849, (about the month of July,) and at a time when said place was under the territorial government of the United States Your petitioner was called on by the alcalde, T. M. Leavenworth, by and with the consent of the town council, to furnish teams to collect stolen goods which had been taken from peaceable citizens then doing business at San Francisco. Your petitioner was also appointed sheriff by a court convened by the said alcalde, with the consent and under the advice of the constituted authorities, and at the earnest appeal of the citizens of the place, to arrest and bring to justice a lawless band of men calling themselves the Hounds. The said court consisted of the following persons as judges, to wit, T. M. Leavenworth, Wm. Gwin, and James Dorel; by whom your petitioner was appointed one of the sheriffs to arrest and hold in confinement the prisoners, and to employ boats to take them from the shipping where they were kept confined, and to furnish victuals and rooms for the jurymen and witnesses, and also to furnish stationery and lights for the convenience of said court while in session, which occupied some eight or ten days. Your petitioner's bill was audited by the clerk of the court by the direction of the alcalde

and his associates, and was forwarded to the then acting governor of California at Monterey, California, to the amount of this part of the claim, to wit, $565. But the acting governor declined allowing or paying said bill, for the want of proper authority so to do. Your petitioner was assured in the undertaking that ten thousand dollars had been set apart by the acting governor, and that all who undertook and spent their time and money would be paid promptly; but of this undertaking your petitioner has never realized one cent. And for the proof of the services, he rests on the evidence of Wm. Webster, Anthony Ten Eyk, William Petit, and deposition of the Secretary of the Treasury taken before Ed. M. Brown, a United States commissioner for the court of claims, at the city of Washington, February, 1859.

And the petitioner further claims the sum of $768 as an undertaker for the relief of sick American sailors at the port of San Francisco in the fall of 1849. (See original order drawn by Edward A. King, then acting harbor-master and collector of said port.) The petitioner in this case was employed by the said King, under the authority vested in him by appointment by Brevet Bennet Riley, a brigadier general in the United States army, and then acting governor of California. About the tenth day of April, 1849, the said sailors being sick and in a destitute situation, and thrown under the care of the said harbor-master, who assured your petitioner that the bills of expense accruing for medicine and attendance should be promptly paid on presentment. But not one of said bills of expense has ever been paid. The petitioner at the time was quite unable to lend the aid he did, and lay out of it even for one month, as he was forced to sell valuable property at a sacrifice and pay a large interest for money, to wit, as high as ten per cent. per month, and for more than three years was forced to pay five per cent. on account of the embarrassment which the said undertaking led him into. He therefore claims, in addition to the several sums of $768 and $565, and also on the one hundred dollars paid to William Stredley, as a constable appointed by the court, and paid at the request of the alcalde, interest at the rate of three per cent. per month, amounting to the sum of $1,627 20, which, added to the principal, amounts to the sum of $2,192 20; and for proof in support of these several sums, he also relies on the testimony of several witnesses above referred to.

Your petitioner is not aware of any act of Congress by which this claim can be paid, but rests on the act of February 27, 1853, for the relief of Brevet General Bennet Riley, which legalized expenses precisely similar, (and who paid the prosecuting attorney and some of the constables of the same court,) incurred and paid by his authority, out of what is called the civil "fund," about the same time whilst he was military governor of California; and such expenditures under said act, and after receiving the approval of the President of the United States, have been passed to his credit on the settlement of his accounts. But the provisions of said act, and of a similar one passed subsequently for the relief of General Mason, are confined to those and to expenses which had been previously paid, and do not apply to outstanding accounts of any description which have not been paid. I

have therefore only to ask, that the court of claims report favorably on the case, and shall rely on Congress to pass a special act for relief; and expecting full pay of the original bills and the full amount of interest appended.

The honorable court of claims has their attention particularly called to the very impertinent letter written by one of the employees of Howell Cobb, Secretary of the Treasury. My account being handed into the office by Senator Gwin, through the President of the United States, *Mr. Cobb's man* took from December to the 16th day of April to answer the simple *will you pay or not?* and at the time says, after promising every other day for four months to give an answer, and having made a street talk about my demands, says, without any reference to the merits of the case or the *extravagant charges*, it has been long since decided that this department has no jurisdiction over claims that accrued prior to the arrival at San Francisco of the customs officers appointed under the authority of the department. Certainly, then, if this class of cases had long before been decided on, there was no reason, in justice or common sense, for the department to take four months to give an answer. And again, this extra clause thrown in to show up *extravagant charges* was stepping out of the Secretary's way to prejudice the case. The customs were collected and the monthly dues of seamen were collected in the same way and under the same rules, and by the authorized agents of the government, and applied to government purposes, in fact, the same as they were in other ports of the United States; and it was either lawful to do so, or else the constituted authorities were allowed to plunder the revenue under a knowledge of the government officials. And it was the duty of the government to protect and take care for the peace and safety of the citizen as well as the soldier and sailor; and it is no excuse or reason to offer by the Secretary that a demand is not to be paid under such circumstances, for the territory was then as much under the authority of the government as it is now, and more directly so. It was at that most important stage when the pioneer had to strain every nerve to live himself; and it was doubly the duty of the government to protect instead of getting in debt to private individuals, and then employ men to put off payment, year after year, for ten and may be for fifteen years. It is a disgrace to the name of freedom, and a base violation of that clause of the Constitution which provides that private property shall not be taken for public use without a reasonable remuneration. This was a taking in that sense. In both cases life and property were at stake; and the aid required by the government of one of its citizens was furnished under a solemn pledge of the constituted authorities that the money paid and services rendered should be promptly paid. Abundance of other testimony might be adduced, but the above is deemed sufficient.

J. H. MERRILL,
Attorney for himself.

IN THE COURT OF CLAIMS.

JOHN H. MERRILL *vs.* THE UNITED STATES.

SOLICITOR'S BBIEF.

Claim for boarding destitute and disabled American seamen at San Fancisco, Cal., before the organization of a State government.

MATERIAL ALLEGATIONS IN PLAINTIFF'S PETITION.

1. That Edward A. King was, on the 10th of April, 1849, appointed by General Riley harbor-master of the port of San Francisco, commissioned on the 19th of June of that year.

2. That, in addition to the usual duties of a harbor-master, there were devolved upon him those of boarding officer and surveyor of the port, and also the care of providing board, lodging, and clothing, and medical attendance for sick, destitute, and disabled American seamen discharged from American vessels in that port.

3. That the revenue laws of the United States were extended over California, and American seamen arriving at that port were liable to and did pay the hospital tax of twenty cents per month out of their wages.

4. That there was at San Francisco no United States hospital or institution for the relief of disabled seamen.

5. That plaintiff was then in possession of an iron ship, (the Antelope,) moored at his wharf and used as a storeship and boarding house.

6. That said King contracted with him that if he would receive the disabled seamen, the United States would see the plaintiff was paid, and that the money was then collected for that purpose.

7. That he received and took care of three such seamen, whose bills amounted to $768, which has not been paid; but that he was entitled to receive that amount with interest.

MATERIAL FACTS PROVED, AS UNDERSTOOD BY THE SOLICITOR.

1. That somebody, in the name of Edward A. King, requested the captain of the Antelope, in October, 1849, to take charge of persons said to be American seamen, one of whom was said to be sick, and whose board, it was said, was to be paid by the government. (Record, p. 10.)

This is the only fact proved that tends to prove any part of the facts set up in the petition.

THINGS NOT PROVED.

1. It is not proved that Edward A. King was appointed by General Riley to any office, either to take charge of sick and disabled seamen, or otherwise.

2. It is not proved that said King sent disabled or sick seamen to be taken care of by plaintiff.

3. It is not proved that plaintiff did take care of sick or disabled seamen on account of the government or otherwise.

4. There is no proof that King or any one else had a legal right

to contract a debt for taking care of sick and disabled seamen, and be paid by the United States.

LEGAL PROPOSITIONS.

1. *Unless King was legally authorized to contract the debt now claimed, the government is not liable.*

There is no show of proof that King was legally authorized by any person to contract this debt; and, consequently, no recovery can be had.

2. *Unless there is proof that the plaintiff rendered the services charged, he could not recover, even if King was authorized to contract the debt.*

There is no evidence whatever that the plaintiff rendered the services for which he has charged. Consequently, he cannot recover. There is, in fact, no proof to sustain the petition, but a single fact that tends to prove anything, and the plaintiff is not proved to be connected with that fact.

There can be no ground on which it is possible for the plaintiff to recover.

R. H. GILLET, *Solicitor.*

NOVEMBER 7, 1859.

IN THE COURT OF CLAIMS.—FEBRUARY 7, 1860.

JOHN H. MERRIL *vs.* THE UNITED STATES.

LORING, J., read the opinion of the Court.

The petitioner sets forth that in 1849 Edward A. King was harbor-master of the port of San Francisco, in the Territory of California, and in such capacity contracted on the part of the United States with the petitioner for board, accommodation, nursing, and medical attendance for sick and disabled American seamen. That there was at that time no hospital or other public institution in San Francisco for the purpose, and that the petitioner received on board his ship Antelope, then moored at his wharf in San Francisco, and used as an hospital, three sick American seamen. And for this he claims of the United States payment as follows:

Board and medical attendance to Mr. Stone, 35 days, at $8 per day, from October 16 to November 25	$280 00
Board to Mr. Hammond from October 29 to November 23, at $8 per day	184 00
Board to Mr. Rodgers from October 13 to November 20, 38 days, at $8 per day	304 00
	$768 00

And the petitioner sets forth that the bill exhibits the price agreed on by Mr. King.

The evidence (p. 9) shows that the petitioner was in possession of the Antelope, and that she was used by him as an hospital, (Webster's answer 2d ;) and Mr. Webster states, (6th answer,) "I have often seen physicians on board the Antelope in attendance upon the sick."

Then three orders, signed "EDW'D A. KING, by W. H. C.," are in evidence, (p. 111,) purporting to be from Mr. King to the petitioner, to receive F. Rodgers, Mr. Stone, and John Hammond as United States hospital seamen. And Mr. Webster testifies (p. 9, answer 4) that these orders are in the handwriting of Mr. W. H. Cruskey, who was the deputy under Edward A. King, harbor-master."

The evidence then exhibits a bill containing the items specified above, made out thus:

"Mr. Edw. A. King, harbor-master,

To John H. Merrill, Dr."

To which is appended the following certificate:

"SAN FRANCISCO, *November* 20, 1849.

"I certify that the above bill is a true copy of the original rendered.

"EDW'D A. KING,

"Harbor master and surveyor of the port."

There is no evidence of the genuineness of the signature of this certificate, and it is not testimony under oath, and it is observable that it does not certify to the correctness of the charges in any particular, but only to the fact that such a bill had been rendered. It does not prove, therefore, the contract alleged between Mr. King and the petitioner, nor the price agreed upon ; nor the number of days the seamen named were on board the Antelope ; nor that they were on board the Antelope at all ; nor is there any evidence of this, for the orders to receive certain men are not evidence that they were received, lodged, fed, nursed, and furnished with medical aid ; and although the orders, the certificate on the bill, and the testimony of Mr. Webster that he "had seen physicians on board the Antelope in attendance on the sick," may induce a belief that some such services as are claimed for were rendered, yet they do not prove that fact, nor show the extent of the services rendered, nor furnish the necessary elements for a judgment.

The evidence shows that such services as those claimed for were then of high cost. Capt. Webster testifies, (p. 9, answer 6 :) "I paid a physician one ounce of gold for each visit to my men," and Mr. Ten Eyck states, (p. 12, 8th answer,) "In the summer of 1850 I was sick for three or four weeks, and paid a physician eight dollars per visit ; and I had a sick friend who paid sixteen dollars per visit. In his case it was for several weeks."

The petitioner also claims payment for services and expenditures in the summer of 1849, as sheriff to a court convened by the "alcalde, with the consent and under the advice of the constituted authorities, and at the earnest appeal of the citizens of the place." It is not shown nor claimed that this court was a court of the United States, or had any authority from them. And Mr. Ten Eyck, a deponent for the petitioner, testifies, (p. 12, answer to 2d interrogatory :) "I know, by gen-

eral report, that there was an organization of desperadoes, so understood, called 'Hounds,' in San Francisco in 1849, and their conduct was of such a character that the whole community was excited, and they organized a court with a view to try and punish them." And when asked (p. 13, 2d cross-interrogatory) "by whom were these expenses to be paid?" he answers, "My impression is that it was understood generally that there was to be a voluntary subscription by the citizens to pay the expenses of said court. I do not know that any subscription was ever obtained to pay said expenses, or that the city government ever paid them."

On these facts and this evidence no claim can be sustained against the United States, and on the whole case we are of opinion that the petitioner is not entitled to relief.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 249.

RICHARD S. COXE.

[To accompany Bill H. R. C. C. 98.]

MAY 2, 1860.—The Court of Claims submitted the following report; which, together with the accompanying bill, was committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

RICHARD S. COXE *vs.* THE UNITED STATES.

1. The petition of the claimant to Court of Claims, and memorial to Congress, withdrawn from Senate by claimant, and filed in the Court of Claims.
2. Documentary evidence filed by claimant and transmitted to the Senate.
3. Claimant's brief.
4. United States Solicitor's brief.
5. Opinion of the court allowing claimant $500.
6. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 1st day of May, A. D. [L. S.] 1860.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE COURT OF CLAIMS.

RICHARD S. COXE *vs.* THE UNITED STATES.

[2] *Petition.*

The petition of Richard S. Coxe respectfully showeth:

That after the government of the United States had, at great expense and with a wise policy, constructed the great national highway called the Cumberland road through parts of the States of Maryland, Pennsylvania, *Maryland*, and Ohio, under and in pursuance of a compact between those States and the United States, a cession was made of so much of the said road as lay within the territorial limits of those States, respectively, to them.

Different constructions were given to these compacts by the different parties to them. The States insisting upon the correctness of their views, in different forms undertook to raise an income from the proprietors of the stages who had contracted to carry the mail of the United States, and then to accomplish the same object by imposing a tax upon each passenger in the mail coaches.

In some instances these impositions were paid by the contractors, in other cases the stages conveying the mail were actually stopped by the State officials until the demand was complied with. *Suits [2½] were instituted to have these controversies judicially settled, and the rights of the respective parties adjusted; such suits, however, in general, were brought only in the State courts, and the judgments in one State possessed no binding authority in another. When given, they were apt to be in accordance with the views of the legislative authority of the State in which the controversy had arisen.

The contractors appealed to the Post Office Department for protection or reimbursement; to enforce their rights to pass over the road without the payment of tax or toll, or if such payment was compelled, to reimburse the amount exacted from them.

The department for years felt its obligation to pursue one or other of these courses. To resist the State authority in collecting these tolls was to bring the general government into conflict with the State functionaries; to reimburse the contractors from whom they were exacted was to involve the government in a heavy pecuniary responsibility. Thousands of dollars had already been obtained in one single State, and until this question of right was settled, it was obvious that, on the one hand, no contract for carrying the mail could be made without indemnifying the contractors for what they might be compelled to pay, thus *imposing on the department an enormous additional [3] expense, or enforcing by an armed force the right claimed on behalf of the government under the compacts. Either of these alternatives would have been attended with the most momentous consequences, pecuniary and political.

It was under these circumstances that in the year 1842 the Hon. Charles Wickliffe, then holding the position of Postmaster General, took this interesting subject into consideration, with an earnest desire

to have the controversy settled. Difficulties presented themselves. The then pressing case was in Pennsylvania, but as both the contractors and the Pennsylvania commissioners were residents of that State, the original obstacle was to have a suit presenting the questions brought before a federal court.

In this emergency your petitioner was first consulted. Mr. Wickliffe thought that as the case stood, only incidentally and collaterally were the interests of the government implicated, but in that way to a large extent. It was a case of that character that, as he thought, the services of the officers of the government, Attorney General, and district attorney, should not be originally required.

Your petitioner having received his instructions from the department, proceeded to Union*town, in Pennsylvania, in the [4] summer of 1842, and an arrangement made with the commissioners representing Pennsylvania, and your petitioner, representing the Post Office Department, under which an amicable suit was agreed to be filed in the district court for the western district of Pennsylvania, and the questions involved to be presented for the judgment of that court upon a statement of the case, as if found specially by a jury. A *pro forma* judgment was to be entered in the district court so that a writ of error might bring the entire case before the Supreme Court for final adjudication.

These proceedings will be found in the 3d vol. Howard's Reports, p. 151. At January term, 1844, this case came on for argument. It was argued by your petitioner alone on behalf of the United States, and by two eminent counsel employed by the State of Pennsylvania. When the argument occurred (March 12) it was near the close of the term, and as some important constitutional questions had been presented, and some members of the court had left the bench, the court directed a new argument to be had at the ensuing term.

Up to this time your petitioner had never received one cent for his professional services in this important case. He had not been remu*nerated for the labor he had performed in the original [5] investigation and preparation of the case, or even for the expenses incurred by him in the summer of 1842, in his visit to Pennsylvania, where he had succeeded in putting the case in a train for final adjustment. He had argued the cause before the Supreme Court without any aid or assistance; he had been opposed by Mr. Fleniken, a gentleman of high professional attainments, and who has since occupied a high diplomatic position under the government, and by R. J. Walker, of whose talents and qualifications it would be superfluous to speak.

On the 16th of March, 1844, your petitioner addressed a letter to the Postmaster General, Mr. Wickliffe, acquainting him with the then posture of the case and asking, for the first time, for a fee. Knowing that Mr. W. had been personally acquainted with my connexion with the case from the beginning, and supposing from his own professional experience that he was both capable of appreciating, and willing to appreciate fairly, the value of the services which I had rendered, I presented no bill, specified no particular amount which ought to be paid me.

Mr. Wickliffe endorsed on this letter as follows: "R. S. Coxe
[6] asks for his fee in this *case. He does not state the amount, but I suppose $200 is about a fair compensation.

" WICKLIFFE.

"Allow him this amount.

" WICKLIFFE."

Your petitioner was surprised and dissatisfied with this meagre allowance, but was assured at the department that the main reasons why a larger allowance was not made were that heavy pecuniary claims then rested on the office; that the payment was only regarded as so much on account; that the case was still pending, and when concluded a fair allowance should be made for the services rendered.

Under these circumstances petitioner received this sum of $200, with this then expressly stated understanding, and continued to act in the case. In January, 1845, the case again came on for argument, and was argued on the 14th and 15th of January of that year, by Messrs. Veich and Walker for the plaintiffs in error, and by Mr. Coxe and the Attorney General for the United States. On the 4th of February the judgment of the court was pronounced, affirming every ground upon which the United States had rested, and thus settling the true construction of the compacts by which the national road had been ceded to the States, invalidating the laws under which taxes had been imposed by State authority upon the coaches
[7] transporting the mails, and interdicting any such *thing for the future. In every aspect of the case this decision, to a very large amount, was important to the government.

Within a short time your petitioner presented his account to the department, with a note accompanying it to the Auditor, Mr. Matthew St. Clair Clarke. The case was submitted to the then head of the department. Unfortunately for the claimant a change had just occurred, and Mr. Wickliffe, under whose administration your petitioner had been employed and had performed his services, was no longer in office. Mr. C. Johnson, his successor, raised objections, which were promptly met and abandoned. They will be briefly alluded to in the papers accompanying this petition. Some of these papers, it would seem, have disappeared, how and when it is impossible for your petitioner to conjecture; they are, however, distinctly referred to in some which remain. The claim was, however, rejected finally by Mr. Johnson.

It is with some reluctance that your petitioner adverts to one circumstance in this case. In one of his interviews with the Postmaster General on the subject, that functionary observed that he was not conversant with the practice, and therefore unable to form an
[8] opinion as to whether your petitioner had, *in fact, been employed as counsel by the department. Your memorialist obtained from Mr. Wickliffe a written certificate, showing not only this fact, but assigning the reasons which, in his judgment, had rendered this action important and valuable. This paper, submitted to the Postmaster General, does not now appear among the papers. A reference to this document will be found in the memorial addressed to

Congress by your petitioner in December, 1845. In reference to the amount of compensation asked by petitioner, your petitioner procured a certificate from Mr. Nelson, the Attorney General—who was associated with petitioner in the second argument of the case before the Supreme Court—which stated that the sum claimed was a reasonable and moderate one. This paper also is among the missing.

In one of my interviews on the subject with Mr. Johnson, it was proposed by one or the other—my recollection though not precise as to the party from which it originated, but clear that it was concurred in by both—that the case should be submitted to the judgment of the then Attorney General, the Hon. John Y. Mason. After several inquiries of that gentleman, I learned from him that no such official reference had been made. It was, therefore, with no small astonishment I received from the Post Office Department the annunciation that *a decision had been made, concluding in these words: [9]
"Mr. Wickliffe regarded the $200 paid as about a fair compensation. Mr. Coxe seems to have acquiesced in it until the late Postmaster General retired from the department. The Postmaster General declines interfering in the case, or making any additional allowance, with the single remark that, in his opinion, in such a case its management should have been exclusively intrusted to the Attorney General of the United States, who seems to have acted as the assistant of Mr. Coxe in this case."

Your petitioner forbears a word of comment upon the censure thus thrown upon the late Postmaster General for the employment of counsel in lieu of the Attorney General, when the circumstances under which it had been done, and the reasons assigned for it, had been clearly laid before the new functionary in the first certificate from Mr. Wickliffe, now among the missing documents. He cannot, however, permit the remark in which his name is mentioned to pass without comment. "Mr. Wickliffe regarded the $200 paid as about a fair compensation. Mr. Coxe seems to have acquiesced in it until the late Postmaster General retired from the department." This was designed to intimate that Mr. W. had regarded the $200 as *about a fair compensation for services already rendered, ex- [10]
penses already incurred, and for those which were in the future to be performed and paid, that your petitioner seemed to have concurred in this view until the late Postmaster General had retired from the department.

Your petitioner must be excused for saying that the two assertions of fact thus adverted to were made without the slightest foundation in fact to justify them, if they were designed to have any, the most remote, bearing upon the case; and that the insinuation implied is not only derogatory to the honor of the party thus wantonly assailed, but as false as it is unwarranted.

Mr. Wickliffe never did intend that the payment of $200 was about a just compensation for services rendered and to be rendered; and unless this is the meaning of Mr. Johnson's remark it is wholly impertinent to the case before him. Mr. Coxe never did acquiesce, or seem to acquiesce, in this decision; and unless he did, the assertion of Mr. Johnson is either irrelevant or untrue. The insinuation that this

acquiescence continued until Mr. W. had retired from the department is equally destitute of even plausibility in the facts of the case. And further, the other facts in the case, exhibited before Mr. C.
[11] Johnson, were sufficient to demonstrate to him *that no basis existed upon which to rest either assertion or insinuation.

Mr. Wickliffe, although "retired" from office, was, nevertheless, not only in the city of Washington, but his residence was within fifty yards of the department; and I have it from Mr. W.'s own lips that, before the date of this paper, he had verbally, at the instance of Mr. Johnson, informed him of the whole case. The information thus communicated, and subsequently given in a letter of Mr. Wickliffe, as well as in the lost certificate, disprove circumstantially the averments of the then Postmaster General, and equally so the insinuation which he makes.

It will, even with all this, hardly be credited that, after having himself suggested, and, if I am inaccurate in that recollection, certainly acquiesced in a reference of the whole matter in controversy to the Attorney General, Mr. Mason, he inquired of Mr. Mason what his opinion would be, and learning from him that it would be in my favor, refused to make the reference, and decided against me. Such facts need no comment.

On September 16, 1845, your petitioner addressed a letter to Mr. Wickliffe informing him of the view taken of the case by his successor, and the interpretation put upon his action of the preceding year. To this he received an answer, dated October 3, 1845,
[12] in which an *account is given of the case and my connexion with it. In reference to the endorsement made by him upon my application in March, 1844, he says: "I did not by that endorsement intend to preclude your claim for compensation for any subsequent services, and, considering the importance of the case to the department, I doubted whether I had allowed what was a reasonable fee in the Supreme Court for what had been done; but, as the case was to be reargued, I did suppose if it was settled favorable to the United States a further compensation would be made you, and it is possible I so told Mr. Clarke, as you say, but have no recollection of it at this time." These papers were laid before Mr. Johnson, and completely annihilate the ground upon which he had placed his decision, but without effect. A copy of the one, and the original of the other, will be found among the papers now filed.

Finding there was no prospect of obtaining justice from the department, your petitioner had no alternative but either to rest quietly under this decision of the Postmaster General or to present his case before Congress, praying for relief. He adopted the latter course, and his memorial, dated December 22, 1845, will be found among the papers.

By the endorsements made on this original memorial it appears as follows:

1845, December 22, referred to the Committee on the Judiciary.
[13] *1846, March 9, bill S. 113 and report.
1846, December 17, referred to Committee on the Judiciary.
1846, December 23, report and bill S. 48.

1847, December 29, referred to the Committee on the Judiciary.
1848, January 5, bill S. 55 and report.
1850, April 11, referred to the Committee on Post Offices and Post Roads.
1850, September 16, resolution 32 and report.
1855, January 17, referred to Committee on Post Offices and Post Roads.
1855, February 13, bill S. 643 and report.

It thus appears that not less than five favorable reports have been made in the Senate, three by the Committee on the Judiciary, and two by the Committee on Post Offices and Post Roads, all accompanied by bills for the relief of petitioner. One of these bills, which has been accidentally found, is herewith filed, or rather it is in the shape of a joint resolution.

It may be observed that no proceeding was had in the case between the session of 1850 and that of December, 1854. During that interval the papers were mislaid, and notwithstanding the most careful search made by General Rusk, the officers of the Senate, and myself, no trace of them could be discovered. In January, 1855, while examining some of the documents of the Senate relating to other matters, I accidentally came across these. On the 16th January, 1855, the fact was communicated to General Rusk in a note of that date, (among the papers.)

It has been repeatedly communicated to pe*titioner that each [14]
and every of these favorable reports were made with the unanimous concurrence of the committees from whom they proceeded, and the bills accompanying them always passed the Senate without, on more than one occasion, a single dissenting voice. In no one instance, however, were they reached for final action in the House of Representatives.

Your petitioner therefore procured a resolution to be passed in the Senate, authorizing him to withdraw the papers from the files of the Senate, for the purpose of laying the case before this honorable court. He therefore submits to the court that he was justly entitled to have and receive from the government, on the 8th March, 1855, at least the sum of $500, and that, having constantly pressed this claim from that date, he is now justly entitled to that amount, with interest until paid, and he prays your honors to report a bill to that effect in his favor.

RICHARD S. COXE *in pro. per.*

DISTRICT OF COLUMBIA, } *ss:* [15]
Washington County, }

Be it remembered, and it is hereby certified, that on this 7th day of January, 1858, before the subscriber, a notary public in and for the county and district aforesaid, duly appointed and qualified, personally appears Richard S. Coxe, and makes oath on the Holy Evangely

of Almighty God that the matters and things stated in the foregoing petition are true as stated, to the best of his knowledge and belief.

[L. S.] In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year above written.

BENJ. P. SMITH,
Notary Public.

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[16] *To the honorable the Senate and House of Representatives in Congress assembled:*

The memorial and petition of Richard S. Coxe respectfully showeth: That various controversies having arisen between the Post Office Department and several of the States through whose territory the National or Cumberland road lay, respecting the right and authority of those States to exact tolls from the parties employed under contract with the government in the transportation of the mail, your memorialist was employed in his professional capacity, as counsel, by the Postmaster General, Mr. Wickliffe, to examine the subject, and if practicable, arrange some plan by which the questions involved could be subjected to a legal investigation, so as to obtain a final judgment on the litigated points by the Supreme Court of the United States.

After a full examination of the subject, your memorialist became satisfied that, under the terms of cession by which the United States had transferred its right to said road to the Commonwealth of Pennsylvania, the legislature of that State had no authority to impose, or its officers to exact from the contractors for carrying the [17] *mail of the United States, and, with the sanction and approbation of the Postmaster General, be arranged with the counsel employed by the State of Pennsylvania, a course of proceeding for the purpose of attaining the desired decision of the questions in controversy.

A suit was entered, by consent, under this arrangement, in the circuit court for the western district of Pennsylvania, in the name of the commissioner of the commonwealth of Pennsylvania against the contractors employed to transport the mail over so much of the National road as lies within the confines of that State. A statement of the facts upon which the legal questions were to arise was prepared by your memorialist, and a *pro forma* judgment obtained in that court, upon which a writ of error was sued out to bring the cause before the Supreme Court.

The case then presented was called for argument at the term of January, 1844, and was argued by your memorialist on behalf of the department, and by the Hon. Robert J. Walker, the present Secretary of the Treasury, on behalf of the State of Pennsylvania. No other counsel appeared on behalf of the United States, the other public duties of the Attorney General preventing him from [18] taking any *part in the discussion. After the argument there appeared to be much diversity of opinion on the subject on the bench, and it appearing that the correct decision of the case involved important constitutional questions, and similar controversies already existed with the States of Virginia and Ohio; and further, the num-

ber of judges of the Supreme Court who heard the argument constitute but a bare quorum of that body, two of those present being citizens of the States with whom the controversy existed, the court resolved to direct another argument of the case before a full court at the next term.

Up to this period your memorialist had never received any compensation for his professional services, so long and so faithfully rendered by him to the government. At this time, however, he addressed a note to the Postmaster General, in which he requested him to transmit a fee. In reply to this communication that gentleman paid your memorialist the sum of $200. At the same time a verbal communication was made to him by the then Auditor of the department, that the funds of the department were then at a low state, that the case was to be reargued, and that when it should be finally decided a full settlement would be made with me for my services.

*With this understanding, and relying upon these assurances, [19] I received this sum, wholly disproportionate to the services which had been already performed.

At the ensuing session of the Supreme Court, December term, 1844, the cause was again called for argument. It was again fully argued by your memorialist, with whom was now associated the Attorney General, and two counsel for the State of Pennsylvania. The case will be found reported in 3 Howard, 151. The judgment pronounced by the court was in accordance with the opinion originally given by your memorialist and in favor of the claim asserted by the United States, that the vehicles employed by it for the transportation of the mail were and must remain exempt from the payment of tolls for passing over the National road. It will be seen that the pecuniary amount involved in that suit was not less than $6,000; that upon its decision rested other heavy claims, and that the exemption adjudged was to be perpetual. It is not often that questions of greater magnitude are discussed before judicial tribunals, and the labors and efforts of your memorialist had been crowned with complete success. The case being thus terminated, your memorialist could not for a moment suppose that *any objection could be made to the [20] payment to him of a fee for the services he had rendered during so long a period of time. He accordingly, after the court had risen, addressed a note to the Postmaster General, requesting the payment of $500, as a further compensation for his services. The Postmaster General, in the first instance, declined making the payment on two grounds: 1st. That he could not ascertain from the records of his department that your memorialist had been employed by the department in the business. 2d. That not being familiar with the usage in the Supreme Court he did not feel himself qualified to judge as to the propriety of the charge. He requested your memorialist to furnish to him some data upon these points which might enable him to judge of the propriety of making the allowance.

Your memorialist accordingly procured and laid before him upon the first point the certificate of Mr. Wickliffe, who had engaged the services of your petitioner, and which fully exhibited the circumstances under which he was employed, and the reasons for doing it.

On the second, he obtained and exhibited a certificate from the late Attorney General, who stated that the charge was a reasonable and moderate one.

[21] *This evidence he could not but suppose would be regarded as entirely satisfactory. To his great surprise, however, the Postmaster General now advanced a new ground of objection, which your memorialist could not possibly have anticipated, viz: that the payment of $200, which had been made the preceding year, was in full satisfaction of the entire services which had then been rendered and were still to be rendered until the termination of the suit.

In this state of the case your memorialist addressed a letter to Mr. Wickliffe, requesting his views on the subject, and received from him a reply in which he not only disavowed the idea that the previous payment was regarded by him in full, but expresses his doubts whether it was an adequate compensation for what had been already done in the Supreme Court, and expected to make further remuneration. These papers were submitted to the Postmaster General, who, notwithstanding this conclusive evidence, adhered to his former decision, and refuses the allowance asked.

Your memorialist therefore finds himself compelled to present his claim for services thus rendered to your honorable bodies for the appropriate relief in the premises.

RICH. S. COXE.

DECEMBER 22, 1845.

COURT OF CLAIMS OF UNITED STATES.

RICHARD S. COXE *vs.* THE UNITED STATES.

Brief of Claimant.

The petition of Richard S. Coxe respectfully showeth: That after the government of the United States had, at great expense and with a wise policy, constructed the great national highway called the Cumberland road, through parts of the States of Maryland, Pennsylvania, and Ohio, under and in pursuance of a compact between those States and the United States, a cession was made of so much of the said road as lay within the territorial limits of those States, respectively, to them.

Different constructions were given to these compacts by the different parties to them. The States, insisting upon the correctness of their views, in different forms undertook to raise an income from the proprietors of the stages who had contracted to carry the mail of the United States, and then to accomplish the same object, by imposing a tax upon each passenger in the mail coaches.

In some instances, these impositions were paid by the contractors, in other cases, the stages conveying the mail were actually stopped by the State officials until the demand was complied with. Suits were

instituted to have these controversies judicially settled, and the rights of the respective parties adjusted—such suits, however, in general, could be brought only in the State courts, and the judgments in one State possessed no binding authority in another. When given, they were apt to be in accordance with the views of the legislative authority of the States in which the controversy had arisen.

The contractors appealed to the Post Office Department for protection or reimbursement. To enforce their rights to pass over the road without the payment of tax or toll, or if such payment was compelled, to reimburse the amount exacted from them.

The department, for years, felt its obligation to pursue one or the other of these courses: to resist the State authority in collecting these tolls was to bring the general government into conflict with the State functionaries; to reimburse the contractors from whom they were exacted was to involve the government in a heavy pecuniary responsibility. Thousands of dollars had already been obtained in one single State, and until this question of right was settled, it was obvious that, on the one hand, no contract for carrying the mail could be made without indemnifying the contractors for what they might be compelled to pay, thus imposing on the department an enormous additional expense, or enforcing by an armed force the right claimed on behalf of the government under the compacts. Either of these alternatives would have been attended with the most momentous consequences, pecuniary and political.

It was under these circumstances that, in the year 1842, the Hon. Charles Wickliffe, then holding the position of Postmaster General, took this interesting subject into consideration, with an earnest desire to have the controversy settled, difficulties presented themselves. The then pressing case was in Pennsylvania, but as both the contractors and the Pennsylvania commissioners were residents of that State, the original obstacle was to have a suit presenting the question brought before a federal court.

In this emergency your petitioner was first consulted. Mr. Wickliffe thought that, as the case stood only incidentally and collaterally, were the interests of the government implicated, but in that way to a large extent. It was a case of that character that, as he thought, the services of the officers of the government, Attorney General, and district attorney should not be originally required.

Your petitioner, having received his instructions from the department, proceeded to Uniontown, Pennsylvania, in the summer of 1842, and an arrangement made with the commissioners representing Pennsylvania, and your petitioner representing the Post Office Department, under which an amicable suit was agreed to be filed in the district court for the western district of Pennsylvania, and the questions involved to be presented for the judgment of that court, upon a statement of the case as if found specially by a jury, a *pro forma* judgment was to be entered in the district court, so that a writ of error might bring the entire case before the Supreme Court for final adjudication.

These proceedings will be found in the 3d vol. Howard's Reports, page 151. At January term 1844, this case came on for argument. It was argued by your petitioner alone on behalf of the United States,

and by two eminent counsel employed by the State of Pennsylvania. When the argument occurred (12th of March) it was near the close of the term, and as some important constitutional questions had been presented, and some members of the court had left the bench, the court directed a new argument to be had at the ensuing term.

Up to this time your petitioner had never received one cent for his professional services in this important case—he had not been remunerated for the labor he had performed in the original investigation and preparation of the case, or even for the expenses incurred by him in the summer of 1842, in his visit to Pennsylvania, where he had succeeded in putting the case in a train for final adjustment. He had argued the cause before the Supreme Court without any aid or assistance; he had been opposed by Mr. Flannigan, a gentleman of high professional attainments, and who has since occupied a high diplomatic position under the government, and by R. J. Walker, of whose talents and qualifications it would be superfluous to speak.

On the 16th March, 1844, your petitioner addressed a letter to the Postmaster General, Mr. Wickliffe, accquainting him with the then posture of the case and as asking, for the first time, for a fee, knowing that Mr. W. had been personally accquainted with my connexion with the case from the beginning, and supposing, from his own professional experience, that he was both capable of appreciating and willing to appreciate fairly the value of the services which I had rendered, I presented no bill, specified no particular amount which ought to be paid me.

Mr. Wickliffe endorsed on this letter as follows: R. S. Coxe asks for his fee in this case. He does not state the amount, but I suppose $200 is about a fair compensation. Wff.
Allow him this amount. Wff.

Your petitioner was surprised and dissatisfied with this meagre allowance; but was assured at the department that the main reasons why a large allowance was not made were that heavy pecuniary claims then rested on the office; that the payment was only regarded as so much on account; that the case was still pending, and when concluded a fair allowance should be made for the services rendered.

Under these circumstances, your petitioner received this sum of $200 with this then expressly stated understanding, and continued to act in the case. In January, 1845, the case again came on for argument, and was argued on the 14th and 15th January of that year, by Messrs. Veich and Walker for the plaintiffs in error, and by Mr. Coxe and the Attorney General for the United States. On the 4th of February the judgment of the court was pronounced, affirming every ground upon which the United States had rested, and thus settling the true construction of the compacts by which the national road had been ceded to the States, invalidating the laws under which taxes had been imposed by State authority upon the coaches transporting the mail, and interdicting any such thing for the future. In every aspect of the case this decision, to a very large amount, was important to the government.

Within a short time your petitioner presented his account to the department, with a note accompanying it to the Auditor, Mr. Matthew

St. Clair Clarke. The case was submitted to the then head of the department. Unfortunately for the claimant, a change had just occurred, and Mr. Wickliffe, under whose administration your petitioner had been employed and had performed his services, was no longer in office. Mr. C. Johnson, his successor, raised objections, which were promptly met and abandoned. They will be found briefly alluded to in the papers accompanying this petition. Some of these papers, it would seem, have disappeared—how and when it is impossible for your petitioner to conjecture. They are, however, distinctly referred to in some which remain. The claim was, however, rejected finally by Mr. Johnson.

It is with some reluctance that your petitioner adverts to one circumstance in this case. In one of his interviews with the Postmaster General on the subject that functionary observed, that he was not conversant with the practice, and therefore unable to form an opinion as to whether your petitioner had, in fact, been employed as counsel by the department. Your memorialist obtained from Mr. Wickliffe a written certificate, showing not only this fact, but assigning the reasons which, in his judgment, had rendered this action important and valuable. This paper, submitted to the Postmaster General, does not now appear among the papers. A reference to this document will be found in the memorial addressed to Congress by your petitioner in December, 1845. In reference to the amount of compensation asked by petitioner, your petitioner procured a certificate from Mr. Nelson, the Attorney General, who was associated with petitioner in the second argument of the case before the Supreme Court, which stated that the sum claimed was a reasonable and moderate one. This paper, also, is among the missing.

In one of my interviews on the subject with Mr. Johnson, it was proposed by one or the other—my recollection, though not precise as to the party from which it originated, but clear that it was concurred in by both—that the case should be submitted to the judgment of the then Attorney General, the honorable John Y. Mason. After several inquiries of that gentleman, I learned from him that no such official reference had been made. It was, therefore, with no small astonishment I received from the Post Office Department the annunciation, that a decision had been made, concluding in these words: "Mr. Wickliffe regarded the two hundred dollars paid as about a fair compensation. Mr. Coxe seems to have acquiesced in it until the late Postmaster General retired from the department. The Postmaster General declines interfering in the case, or making any additional allowance, with the single remark that, in his opinion, in such a case its management should have been exclusively intrusted to the Attorney General of the United States, who seems to have acted as the assistant of Mr. Coxe in the case."

Your petitioner forbears a word of comment upon the censure thus thrown upon the late Postmaster General for the employment of counsel in lieu of the Attorney General, when the circumstances under which it had been done, and the reasons assigned for it, had been clearly laid before the new functionary in the first certificate from Mr. Wickliffe, now among the missing documents. He cannot, how-

ever, permit the remark in which his name is mentioned to pass without comment. "Mr. Wickliffe regarded the $200 paid at about a fair compensation, Mr. Coxe seems to have acquiesced in it until the late Postmaster General retired from the department." This was designed to intimate that Mr. W. had regarded the $200 as about a fair compensation for services already rendered, expenses already incurred, and for those which were in the future to be performed and paid—that your petitioner seemed to have concurred in this view, until the late Postmaster General had retired from the department.

Your petitioner must be excused for saying, that the two assertions of fact thus adverted to were made without the slightest foundation in fact to justify them, if they were designed to have any the most remote bearing upon the case, and that the insinuation implied is not only derogatory to the honor of the party thus wantonly assailed, but as false as it is unwarranted.

Mr. Wickliffe never did intend that the payment of $200 was about a just compensation for services rendered, and to be rendered—and unless this is the meaning of Mr. Johnson's remark, it is wholly impertinent to the case before him.

Mr. Coxe never did acquiesce or seem to acquiesce in this decision, and unless he did the assertion of Mr. Johnson is either irrelevant or untrue. The insinuation that the acquiescence continued until Mr. W. had retired from the department, is equally destitute of even plausibility in the facts of the case, and further, the other facts in the case exhibited before Mr. C. Johnson were sufficient to demonstrate that no basis existed upon which to rest either assertion or insinuation.

Mr. Wickliffe, although "retired" from office, was, nevertheless, not only in the City of Washington, but his residence was within fifty yards of the department, and I have found it from Mr. W. own lips, that before the date of this paper he had verbally, at the instance of Mr. Johnson, informed him of the whole case.

The information thus communicated and subsequently given in a letter of Mr. Wickliffe, as well as in the lost certificate, disprove circumstantially the averments of the then Postmaster General, and equally so, the insinuations which he makes.

It will, with all this, hardly be credited, that after having himself suggested, and if I am inaccurate in that recollection, certainly acquiesced in a reference of the whole matter in controversy to the Attorney General, Mr. Mason, he inquired of Mr. Mason what his opinion would be, and learning from him that it would be in my favor, refused to make the reference, and decided against me. Such facts need no comment.

On the 16th of November, 1845, your petitioner addressed a letter to Mr. Wickliffe, informing him of the view taken of the case by his successor, and the interpretation put upon his action of the preceding year. To this he received an answer, dated October 3, 1845, in which an account is given of the case and my connexion with it. In reference to the endorsement made by him upon my application in March, 1844, he says, "I did not, by that endorsement, intend to preclude your claim for compensation for any subsequent services, and, considering the importance of the case to the department, I doubted whether I

had allowed what was a reasonable fee in the Supreme Court, for what had been done, but as the case was to be reargued, I did suppose, if it was settled favorable to the United States, a further compensation would be made you, and it is possible I so told Mr. Clarke as you say—but have no recollection of it at this time."

These papers were laid before Mr. Johnson, and completely annihilated the ground upon which he had placed his decision, but without effect. A copy of the one and the original of the other will be found among the papers now filed.

Finding there was no prospect of obtaining justice from the department, your petitioner had no alternative, but either to rest quietly under this decision of the Postmaster General, or to present his case before Congress, praying for relief. He adopted the latter course, and his memorial, dated the 22d of December, 1845, will be found among the papers.

By the endorsements made on this original memorial it appears as follows:

1845, December 22—Referred to the Committee on the Judiciary.
1846, March 9—Bill S. 113 and report.
1846, December 17—Referred to the Committee on the Judiciary.
December 23—Report and bill S. 48.
1847, December 29—Referred to the Committee on the Judiciary.
1848, January 5,—Bill S. 55 and report.
1850, April 11—Referred to the Committee on Post Offices and Post roads.
September 10—Resolution and report.
1855, January 17—Referred to the Committee on Post Offices and Post Roads.
February 13—Bill S. 643 and report.

It thus appears that not less than five favorable reports have been made in the Senate, three by the Committee on the Judiciary, and two by the Committee on Post Offices and Post Roads, all accompanied by bills for the relief of petitioner. One of these bills which has been accidentally found is herewith filed, or rather, it is in the shape of a joint resolution. It may be observed that no proceeding was had in the case between the session of 1850 and that of December, 1854. During that interval the papers were mislaid, and notwithstanding the most careful search made by General Rusk, the officers of the Senate and myself, no trace of them could be discovered. In January, 1855, while examining some of the documents of the Senate relating to other matters, I accidentally came across these. On the 16th January, 1855, the fact was communicated to General Rusk in a note of that date (among the papers.)

It has been repeatedly communicated to petitioner that each and every of these favorable reports were made with the unanimous concurrence of the committees from whom they proceeded, and the bills accompanying them always passed the Senate without, on more than one occasion, a single dissenting voice. In no one instance, however, were they reached for final action in the House of Representatives.

Your petitioner therefore procured a resolution to be passed in the Senate, authorizing him to withdraw the papers from the files of the

Senate, for the purpose of laying the case before this honorable court. He therefore submits to the court that he was justly entitled to have and receive from the government on the 8th of March, 1845, at least the sum of $500, and that having constantly pressed this claim from that date, that he is now justly entitled to that amount with interest until paid. And he prays your honor to report a bill to that effect in his favor.

RICHARD S. COXE *in pro. per.*

IN THE COURT OF CLAIMS.

RICHARD S. COXE *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Material facts as averred in the petition.

1. That a suit was brought by Searight against Stockton & Stokes, involving the right to collect tolls on mail coaches on the Cumberland road, in Pennsylvania, after the cession of that part of the road to that State.

2. That the Post Office Department believed that the United States were interested in the question, and the Postmaster General, Mr. Wickliffe, employed the plaintiff to aid in the defence of the suit.

3. That he went to Pennsylvania and arranged the proceedings in the court below so as to have the proper legal questions presented to and be determined by the Supreme Court.

4. That the case was argued by himself alone in the Supreme Court at the January term, 1844, and reargued by him with the Attorney General of the United States at the next term, when final judgment was given against the plaintiff.

5. That he has been paid only the sum of two hundred dollars, which was paid by direction of Mr. Wickliffe.

6. That Mr. Wickliffe's successor refused to pay him anything more, and that he was then entitled to the further sum of $500, which has never been paid.

7. That his services were worth all he charged.

From the evidence found in the record, the solicitor thinks it his duty to admit that these averments are true.

The value of the services are proved by counsellors of high standing to be much more than the plaintiff originally claimed.

The successor of Mr. Wickliffe did not question the power of his predecessor to employ and pay counsel, but was of opinion that the plaintiff had been sufficiently paid. As the power to employ was admitted, and there being no question of law in the case and no dispute about facts, the solicitor submits the case upon the record to the court.

R. H. GILLETT,
Solicitor.

NOVEMBER 11, 1859.

IN THE COURT OF CLAIMS.

March 5, 1860.

RICHARD S. COXE *vs.* THE UNITED STATES.

LORING, J., delivered the opinion of the court.

In the year 1842 questions were pending between the United States, on the one part, and the States of Maryland, Pennsylvania, and Ohio, on the other part, as to their respective rights under the compact of cession made by the United States to these States of the portions of the Cumberland road within their respective territories.

The States claimed the right of raising revenue by taxes on the proprietors of the coaches carrying the mail and on passengers, and they attempted to enforce this right by suits at law. The contractors called upon the United States to defend and indemnify them against these suits, and to protect them in the execution of their contracts.

This brought the United States to the alternative, of submitting to a continuous and heavy pecuniary burden, imposed without right, or of forcible resistance to the State authorities.

In these circumstances Mr. Wickliffe, then Postmaster General, sought to end the controversy by its judicial decision in the Supreme Court of the United States. He says in his deposition, (p. 40,) "that it occurred to him first that such proceedings should be instituted; and he is of opinion that he submitted the facts to the President, in Cabinet council, and had the concurrence of President and council as to the necessity of such a proceeding, and I employed Mr. Coxe to proceed to Pennsylvania, to be assisted by Mr. Stockton, contractor, to make up an agreed case of facts."

This evidence proves that Mr. Coxe was retained by the United States, and the authority of the Postmaster General for the purpose and under the circumstances is not questionable. But on this subject Mr. Wickliffe says (p. 40) "he knows no specific law which made it his duty as Postmaster General to institute such proceeding, but he regarded it his duty as Postmaster General to take all legal steps in court to advance and protect the interest of the department, and it was under this law or obligation of duty I acted in the premises."

Mr. Coxe being thus retained by the United States, and under instructions from the department, proceeded to Uniontown, in Pennsylvania, and there, and afterwards at Washington, conferred with Mr. Fleniken, counsel for the plaintiffs in the case of Seawright *et al. vs.* Stockton *et al.*, which involved the question at issue. And it was arranged that an agreed statement of facts, to be drawn up by Mr. Coxe, should be entered on the record, a judgment *pro forma* taken, and the suit then carried by writ of error to the Supreme Court of the United States, and this was done.

In 1844, at the January term of the court, the case was argued by Mr. Coxe alone for the United States, and by Mr. Fleniken and the Hon. Robert J. Walker for the plaintiffs in error. The case involved

grave questions of constitutional law, and as the argument was had before a bare majority of the judges, a reargument was ordered by the court, (p. 50.) At the December term of the court the case was reargued by Mr. Coxe and the Attorney General for the United States, and by Mr. Leech and Mr. Walker for the plaintiffs, and on the 4th February, 1845, judgment was rendered for the defendants, and the objects of the United States were fully obtained.

The nature of the suit and its litigation is thus stated by Mr Fleniken, (p. 51:) "This cause, from beginning to end, was attended with much trouble, and engaged the close attention and professional anxiety of counsel on both sides. The amount of tolls thus accumulated upon these coaches was large and a matter of importance, not only to the government but also to the road; and the present payment, to say nothing of the future, was earnestly resisted by the Post Office Department, and as earnestly urged by the road, as well as the political question of State sovereignty, which we regarded as assailed by the pretensions of the Post Office Department." And Mr. Wickliffe says, (p. 41:) "I regarded the interest which the department had in the settlement of that question as of immense importance."

Of Mr. Coxe's services Mr. Fleniken says, (p. 51:) "In the management of the cause on behalf of the government Mr. Coxe did all that professional industry, skill, and ability could bestow." The Hon. Reverdy Johnson says, (p. 56:) "I was present, however, during a part of the argument, and know that Richard S. Coxe, the petitioner, argued the case for the defendants in error with the then Attorney General, the Hon. John Nelson. He argued it, I thought then, and still think, with great ability." And Mr. Nelson says: "Besides arguing the cause, my impression is, that Mr. Coxe prepared the brief, and performed whatever other service was necessary preliminary to the hearing. The report will further show that the statement of the agreed facts, in the court below, was prepared by Mr. Coxe; but of this I have no personal knowledge."

The evidence shows that Mr. Coxe was duly retained by the United States for this important and difficult litigation, and that he ably and efficiently performed his professional duties. As, by the testimony of Mr. Wickliffe, (p. 23,) "no fee was spoken of or settled as to amount" when Mr. Coxe was retained, he was legally entitled to a fair remuneration for his expenses and services. His whole charge to the United States, including the cost of his journey to Uniontown, "certainly once," and all his labor in preparing the cause for argument and arguing it twice in the Supreme Court, was $700; of this amount he received $200 during the progress of the cause, and, as the evidence shows, "*on account*," and he now claims $500 as a balance unpaid.

Of the reasonableness of this claim, and of the proper compensation for Mr. Coxe's services, Mr. Fleniken says, (p. 51:) "From my knowledge of his services in the aforementioned case I regard his charge of $500 as very moderate, and had it been double that, it would, in my opinion, come nearer a just and fair compensation for his professional labor;" and Mr. Reverdy Johnson says, (p. 57:) "I am familiar with the character of the case in 3 Howard, and from the nature of the

questions involved, my opinion is, for the preparation of the case, in the court below, with a view to its being taken to the Supreme Court for final decision, and for the argument of it before that court, and for a second argument before the same tribunal, two thousand dollars, ($2,000,) at least, would not be more than a reasonable compensation." (Ans. 3d.) And Mr. Nelson says, (p. 62:) "My impression is, that the sum of two thousand dollars would be a reasonable compensation for the services mentioned in the third interrogatory." And the record shows (p. 28) that the Hon. J. Y. Mason, then Attorney General, concurred in the estimate of Mr. Nelson.

On this evidence we are of opinion that the sum, five hundred dollars, claimed by the petitioner is clearly due to him from the United States, and to the sum claimed this court is limited.

But the record shows that the Hon. Cave Johnson, successor to Mr. Wickliffe in the office of Postmaster General, rejected the claim of the petitioner; and, in relation to that, the facts in evidence are, that on March 16, 1844, after the first argument of the case and the order by the court for its reargument, Mr. Coxe addressed a note to Mr. Wickliffe, in which he stated to Mr. Wickliffe the position of the cause, and added: "If you can now pay me a fee in this case you will confer a particular favor on me." (p. 19.) On this note Mr. Wickliffe endorsed, (p. 23:) "R. S. Coxe asks for (this) fee in this case; he does not state the amount, but I suppose $200 is a fair compensation." This amount of $200 was then paid to Mr. Coxe.

After the second argument of the case and the rendition of the judgment, February 4, 1845, viz: on the 8th March, 1845, Mr. Coxe rendered his bill to the Post Office Department for the sum of five hundred dollars as then due him. On this the Hon. Cave Johnson made the decision shown in the record, (pp. 31, 32, 33,) rejecting the claim and referring to the letter of Mr. Coxe to Mr. Wickliffe, dated 16th March, 1844, and to Mr. Wickliffe's indorsement thereon. In his decision Mr. Johnson says: "There is nothing in the letter of Mr. Coxe from which an inference could be drawn that he was to be paid for the argument of the case at the time when it was continued, nor is there anything in the decision of Mr. Wickliffe that he was paying only a part of the fee. The inference is directly the reverse, that Mr. Wickliffe was paying *the fee*, and that Mr. Coxe regarded the payment of *a fee now* (in March, 1844) as a particular favor. No other demand seems to have been made on Mr. Wickliffe whilst he continued in the office, although the account bears date January, 1845, two months before he left the department * * * Mr. Wickliffe regarded the $200 paid as 'about a fair compensation.' Mr. Coxe seems to have acquiesced in it until the late Postmaster General retired from the department."

The evidence before this court repels entirely the inferences above set forth. Mr. Wickliffe states expressly: "I doubted whether I had allowed what was a reasonable fee for what had been done; but as the case had to be reargued I did suppose, if it was settled favorable to the United States, a further compensation would be made you." (pp. 24, 25.)

Then the record shows that the second argument was made January

14 and 15, 1845 ; that the judgment was rendered February 4, 1845, (p. 30,) and that Mr. Coxe's bill was rendered March 8, 1845. This shows the presentment of the bill in reasonable and proper time after the termination of the suit, and entirely absolves Mr. Coxe from any imputation on that score. And on the evidence and facts it is not conceivable that either Mr. Wickliffe or Mr. Coxe considered the $200 paid as covering the future litigation, which was then uncertain and could not be measured, or as anything more than one of those payments "*on account*" usual and proper in the progress of a cause where, as in this, counsel had been subjected to actual expenditures which had not been provided for by a retainer.

After the rejection of his claim by the Postmaster General, the Hon. Cave Johnson, Mr. Coxe carried it by petition, dated December 22, 1845, to Congress. There it appears that five favorable reports were made in the Senate, accompanied by bills for the relief of the petitioner, and that in no instance were these reached for action by the House of Representatives.

In the year 1850 the papers were mislaid, and, though diligently searched for, could not be found until 1855, when they were accidentally found in the office of the Secretary of the Senate. They were subsequently, on motion and leave, withdrawn from the Senate to be brought here.

Mr. Coxe claims interest on $500 from March 8, 1855, when his bill was presented to the Post Office Department and was due and payable; but the mere fact that the money was then due and demanded does not, of itself, support a claim for interest.

On the whole case we are of opinion that the United States is justly indebted to the petitioner in the sum of five hundred dollars, and that for that sum he is entitled to relief. A bill will be reported to Congress accordingly.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 250.

EDWARD SANGSTER, ADMINISTRATOR OF HUGH WEST.

MAY 2, 1860.—Reported from the Court of Claims, referred to a Committee of the Whole House, and ordered to be printed.

THE COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

EDWARD SANGSTER, ADMINISTRATOR OF HUGH WEST, *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documentary evidence, filed by claimant, and transmitted to the House of Representatives.
3. Documentary evidence filed by the government, and transmitted to the House of Representatives.
4. Claimant's brief.
5. United States Solicitor's brief.
6. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this 1st day of May, A. D. 1860.

[L. S.] SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable Court of Claims:

The petition of Edward Sangster, of the city of Alexandria, in the State of Virginia, administrator of Hugh West, late of the said city, now deceased, respectfully showeth: That the said Hugh West was, during the year 1806, and for some time before and after that year, surveyor of the customs for the district of Alexandria, then in the District of Columbia, and, as such, was entitled to all the rights privileges and emoluments of said office.

That under the provisions of the 91st section of the act of Congress, entitled "*An act to regulate the duties on imports and tonnage*," passed 2d March, 1799, (Vide U. S. Statutes at Large, vol. 1, p. 697,) (there being no "Naval office" at the said port,) your petitioner's intestate was entitled to *one-fourth* of all forfeitures distributable under the said 91st section, which accrued at the said district and port of Alexandria.

THE UNITED STATES *vs.* THE SCHOONER BETSEY AND CHARLOTTE.

[Record.]

UNITED STATES OF AMERICA:

Be it remembered, that at a United States district court for the District of Columbia, continued and held by adjournment at the court-house in the town of Alexandria, before the Honorable William Cranch, chief judge of the circuit court of the said district, on the second day of December, in the year of our Lord eighteen hundred and six, came Walter Jones, junior, esquire, United States district attorney for the District aforesaid, and, in the name and behalf of the United States, gives the court here to understand and be informed: "That after the passing of a certain statute or act of Congress, entitled 'an act to suspend the commercial intercourse between the United States and certain parts of the Island of St. Domingo,' and after due notice of the said act at the custom-houses respectively—that is to say, on or after the twenty-third day of September, in the year eighteen hundred and six—a certain vessel or schooner called the Betsey and Charlotte, wholly owned by one William Yeaton, a person resident within the United States—that is to say, at the town of Alexandria, in the District aforesaid, employed by the said William Yeaton, and commanded by one James Abbott, master—sailed from a port of the United States—that is to say, from the port of Alexandria, in the District aforesaid—and from thence was, contrary to the intent of the said act, voluntarily carried, either directly or from some intermediate port or place, to some port or place within the island of St. Domingo, and not in the possession nor under the acknowledged government of France; that the said vessel, owned, employed, and commanded as aforesaid, returned to the port of Alexandria, in the District aforesaid, within the proper jurisdiction of this court, from her voyage aforesaid, on the twenty-third day of November in the year aforesaid, and at her return aforesaid there was found on board a cargo consisting of two hundred and eleven bags of coffee, ten barrels of sugar, and seventeen thousand and forty-one pounds of logwood, belonging or consigned to the said William Yeaton. By reason of the violation of the said act of Congress as aforesaid, and by virtue of the same act, the said schooner or vessel, her tackle, apparel, and furniture, and also her cargo aforesaid, have become wholly forfeited and liable to be seized and condemned in this court; and being so liable were, for the causes above stated, seized by Charles Simms, esq., collector for the district and port of Alexandria, in the District of Columbia aforesaid, and within the proper jurisdiction of this court, on the twenty-fourth day of November in the year aforesaid, and are now detained and held to be proceeded against in due course of law. Wherefore, the said Walter Jones, junior, prosecuting in the name and on behalf of the United States, prays the advice of the court in the premises, and that such proceeding may be had that, by the final sentence of this court,

the said schooner or vessel called the Betsey and Charlotte, her tackle, apparel, and furniture, and also her cargo found on board as aforesaid, may be condemned and disposed of according to the laws of the United States in such case made and provided." And thereupon came Daniel C. Brent, esq., marshal of the District of Columbia, and made return of his process awarded in this case; that he hath arrested the schooner Betsey and Charlotte, and cited James Abbott and William Yeaton to appear as directed, and also arrested the rigging, tackle, apparel, furniture, and cargo in the possession and custody of the collector of the port of Alexandria.

And the aforesaid William Yeaton appeared and offered to file his claim and plea to the libel in this case, and on motion of the libellants, by their attorney, it is ordered that he give security in the sum of two hundred dollars to respond to the costs in case he shall fail to make his claim good.

Whereupon the said William Yeaton, together with John Tucker, his security, acknowledged a bond for the same, which is approved by the court; and the said William Yeaton appeared by Charles Lee, esq., his attorney, and offered to file his claim and plea in the following words, to-wit: (here follows the claim and plea;) which motion was overruled by the court, *the same plea and claim not being offered upon oath;* to which opinion of the court the said William Yeaton excepts, and prays that the same may be enrolled, &c., which is done accordingly.

W. CRANCH, [L. S.]

And thereupon the said William Yeaton offered his claim and answer upon oath, which is received by the court, and is in the following words, to-wit:

"The said William Yeaton, having given security according to the order of the court, appeared by Charles Lea, his proctor, and prayed the court for leave to make his claim to the vessel and cargo in the said bill mentioned, and to make his answer thereto; which is granted him. Whereupon he made his claim, as follows:"

"Before the honorable the district court in and for the district of Columbia comes William Yeaton, by Charles Lee, his attorney, and claims the said vessel or schooner called the "Betsey and Charlotte," her tackle apparel and furniture, and her cargo aforesaid, now lying at Alexandria, within the jurisdiction of this honorable court, and presented by the bill filed by Walter Jones, junior, attorney for the district aforesaid, in the name of and on behalf of the United States, and saving and reserving to himself all benefit of exception to the errors, imperfections, and insufficiencies of said bill, and especially saving to himself the benefit of exception to the jurisdiction of this court to hold cognizance and to proceed to trial of the matters charged in said bill according to the course of an admiralty court, without a trial by jury. For answer he saith that true it is the said vessel or schooner, called the Betsey and Charlotte, was and is the property of him, the said William Yeaton, a resident within the United States aforesaid, and sailed in his employment, under the command of the

said James Abbott, from the port of Alexandria, in the district aforesaid, upon a sea voyage, after the passing of the said statute in the said bill mentioned, and after due notice of the said statute at the custom-house of Alexandria aforesaid, and after the 23d day of September, in the year 1806; and that true it is the said vessel, owned, employed, and commanded as aforesaid, returned into the port of Alexandria aforesaid on the 25th day of November, in the year last mentioned, laden with the cargo in the bill mentioned, and belonging to the said William Yeaton aforesaid; and that true it is the said vessel and cargo are seized as forfeited under the aforesaid statute of Congress, by Charles Simms, collector at the said port of Alexandria. But further, he saith that the said vessel was not, after she sailed from Alexandria aforesaid, carried by this claimant or by his direction, or by any other person, to his knowledge, voluntarily, either directly or from any intermediate port or place to any port or place within the Island of St. Domingo, and not in the possession nor under the acknowledged government of France, contrary to the statute of Congress aforesaid, as is in the said bill alleged; and this the said William Yeaton is ready to prove and verify. Wherefore he prays judgment, and that the said vessel, her tackle, apparel, and furniture, and her cargo aforesaid, may be restored to him," &c.

Alexandria county, to wit: William Yeaton appeared personally before me, a justice of the peace of said county, and made oath that all the matters herein set forth are true, as therein stated. Given under my hand this 2d of December, 1806.

ELISHA C. DICK.

And, by consent of parties, the hearing is continued till to-morrow. At which day, to wit, the third day of December, in the year aforesaid, and Walter Jones, jr., esq., attorney for the United States, appeared and filed a supplemental libel, which follows, in these words, to wit: "And the said Walter Jones, jr., prosecuting as aforesaid, further propounds to the court, (in addition to the matter contained in the said libel,) as follows: 'That the said schooner Betsey and Charlotte, at the time of sailing from the port of Alexandria as aforesaid, as charged in the said libel and admitted by the claimant and respondent, was destined to proceed to Cape Francois, a part of the Island of St. Domingo, not in the possession nor under the acknowledged government of France, but on the contrary, in the possession and under the government of a power and people disclaiming all allegiance to and dependence upon France, and assuming independent sovereignty, under the title of the Empire of Hayti, or to some other part of the said island similarly situated; that in prosecution of the said unlawful destination, the outward cargo was assorted for the purpose of suiting the market of such parts of the Island of St. Domingo as were so situated, and the said schooner was accordingly carried to the said port or place of Cape Francois in the said island, where the outward cargo was disposed of and a return cargo procured and taken on board. And the said Walter Jones, jr., prosecuting as aforesaid, excepting to and contesting the truth and sufficiency of the negative allegation

contained in the said claim and answer of the said William Yeaton, prays that the said claimant and respondent may be personally examined upon oath, in open court, upon the following and annexed interrogatories, respectively, and to such further and other interrogatories as may be propounded to him under the direction and control of this court, and that his answers to the same, respectively, may be taken down in writing, according to the due course of admiralty in this court. And the said Walter Jones, jr., prosecuting as aforesaid, prays as before, that the said schooner, her tackle, apparel and furniture, and also the cargo aforesaid, may by the definitive sentence and decree of this court, be adjudged and condemned as forfeited, according to the laws of the United States in such case made and provided, &c.

And the said William Yeaton, the claimant aforesaid, by Charles Lee, his proctor, appeared and filed his supplemental answer and plea to the same, upon oath, which is received by the Court, and is in the words following, to wit: "The further answer of William Yeaton to the supplemental bill, and especially to the jurisdiction of this court to hold cognizance of the matter charged in said supplemental libel, according to the course of admiralty without a jury, answering, saith, that the said schooner Betsey and Charlotte at the time of sailing from the port of Alexandria aforesaid, as charged in said libel, was not destined to proceed to Cape Francois, a port in the Island of St. Domingo, not in the possession nor under the acknowledged government of France, but in possession and under the government of a power and people disclaiming a dependence upon France and assuming independent sovereignty, under the title of the Empire of Hayti, or to any other part of the said island similarly situated; that the outward cargo of said schooner, as this respondent has been informed and believes was asserted, but was not asserted as he believes or knows of for the purpose of being carried and sold in any part of the Island of St. Domingo not in the possession nor under the acknowledged government of France—it was destined to the port of St. Jago de Cuba in the Island of Cuba; that the said cargo was not carried into Cape Francois aforesaid, according to its original destination, but was carried there contrary to its original destination; that the said outward cargo was there forcibly taken by certain persons acting or pretending to act under the government of Hayti, as this respondent and claimant was informed and verily believes, and after the same was so taken by force, and offer of compensation in the produce of that island was made, and the produce such as was offered in quantity and quality was received on board and brought back to America; all which he is ready to prove and verify, &c. And he prays as before, that the said vessel and cargo may be restored, with his costs, &c.

WM. YEATON.

Sworn to in open court, 3d December, 1806; and thereupon the following interrogatories were propounded on behalf of the libellants, to wit:

(Here follows the interrogatories.)

And the said respondent and claimant is ordered to answer the same upon oath, which answers are in the following words, to wit:

(Here follow the answers.)

And the hearing is continued till to-morrow. At which day, to wit: the fourth day of December, in the year aforesaid, came the parties aforesaid, and the said William Yeaton appeared before the court, and before the examination of any witnesses or the production of any testimony on the part of the United States, and prayed leave to correct an error in the answers given on yesterday to the interrogatories by stating a matter not recollected at that time, which leave is granted him, whereupon he gave in the following answer in addition to and correction of said answers.

(Here follows the answer.)

And upon giving the foregoing additional answer, the United States attorney prayed that the said William Yeaton might be put to answer upon oath as before the following additional interrogatories, to wit:

(Here follow the additional interrogatories.)

To which interrogatories the said William Yeaton made the following answers, upon his oath, to wit.

(Here follow the answers.)

And thereupon the court proceeded to the examination of the following witnesses on the part and in behalf of the libellants, to wit:

(Here follows the testimony.)

And now here at this day, to wit, the eleventh day of December, in the year of our Lord eighteen hundred and six, came the parties aforesaid, by their attorney, and this cause having been heard upon the libel, supplemental libel, and upon the claim and answers of William Yeaton, the claimant, and upon the depositions and testimony and other evidence, produced as well on the part and behalf of the United States as on the part and behalf of the said William Yeaton, the claimant of the said schooner and cargo, and the same being by the court fully heard and considered, it is the opinion of the said court thereupon that the said schooner, being a vessel owned wholly by a person or persons resident within the United States after the passage of the act of Congress, entitled "An act to suspend commercial intercouse between certain parts of the Island of St. Domingo," and after due notice of the said act at the custom-house of the port of Alexandria, did sail from the said port of Alexandria, a port of the United States, and was, after the passage of the said act and after due notice thereof, as aforesaid, and contrary to the intent of the said act, voluntarily carried from the said port of Alexandria directly to the port of Cape Francois, a port or place within the Island of St. Domingo, and not in the possession and under the acknowledged government of France, as in and by the said libel it is alleged, and thereupon it is considered, ordered, and adjudged, by the said court, that the said schooner, her tackle, apparel, and furniture, as well as the cargo found on board the same at her return from the said voyage to the United States, be, and the same are hereby, for the causes aforesaid, forfeited and condemned. And it is hereby further ordered by the court that the marshal of the District of Columbia do and shall, on or before the first day of January next, at the coffee house in the town of Alexandria,

sell the said schooner, her tackle, apparel, and furniture, and her cargo aforesaid, to the highest bidder at public auction, for ready money, giving fifteen days' notice of the time and place of such sale in the two newspapers published in the town of Alexandria. And it is further ordered that the marshal pay over to the clerk, according to law, the amount of such sale, deducting all proper charges, to be by him safely kept until the further order of the court. From which sentence and condemnation the claimant and respondent, William Yeaton, prays an appeal to the circuit court of the District of Columbia, which is granted him accordingly; and, by consent of parties, the marshal is ordered, notwithstandng the appeal prayed and granted in this cause, to proceed on the sixteenth day of this month to sell the said schooner, her tackle, apparel, and furniture, and also the cargo aforesaid, to the highest bidder, at public auction, on a credit of ninety days from the day of sale, to be secured by good negotiable notes, to be approved by the clerk and marshal, and the money arising from such sale to be paid over to the clerk, and by him held for the final decree in this cause; the marshal to give notice of the time and place of such sale in the public newspapers of the town of Alexandria.

Marshal's return.

In pursuance of the annexed decree of the honorable the district court of the District of Columbia, dated the 12th day of December, 1806, I proceeded, on the 16th day of the same month, to sell at public auction to the highest bidder, on credit of ninety days, for approved negotiable notes, the schooner Betsey and Charlotte, her rigging, tackle, apparel, and furniture; and also her cargo, having first duly advertised the time and place of sale in the Alexandria newspapers, as by the said decree required. An account of which sales, together with the expenses incurred, and marshal's commissions, are herewith exhibited.

Sales.—Schooner, and rigging, &c.....		$410	00
6,225	weight of coffee, at 27½ cents per pound.....	1,711	87½
9,600	weight of coffee, at 27 cents per pound.....	2,592	00
6,225	weight of coffee, at 26½ cents per pound.....	1,649	62½
3,735	weight of coffee, at 52½ cents per pound.....	952	42½
494	weight of sugar, at $10 75 per cwt.....	53	10½
1,235	weight of sugar, at $8 75 per cwt.....	108	06
741	weight of sugar, at $6 75 per cwt.....	50	01½
8½	tons of logwood at $5 per ton.....	42	50
		7,569	60½

Expenses incurred and marshal's commissions.

To Dennis Ramsay, amount of his bill for wharfage	$20 89	
To Thomas Irwin, for storage of cargo	11 32½	
To Richard Dinsmore, for advertising sale	2 00	
To Samuel Snowden, for advertising sale	2 00	
To marshal's commissions, on amount of sales	100 86	137 07½
		7,432 53

Note.—In this case William Yeaton became the *entire* purchaser, and his note, jointly with Robert Young for $7,569 60, made payable at ninety days to Dennis Ramsay or order, and by him endorsed, was approved and accepted of in payment, agreeably to the terms of the sale; which note, when due, was not taken up, but has been regularly protested, and a suit commenced by the attorney of the United States against the drawers; therefore that part of the decree which directs that the money arising from the sale to be paid over to the clerk cannot as yet be complied with.

R. MOSS, *Deputy Marshal.*
For D. C. BRENT, *Marshal.*

MAY 13, 1807.

At a United States circuit court of the District of Columbia, continued and held by adjournment for the county of Alexandria, the 17th day of January, 1807, *William Yeaton, owner and claimant of the schooner Betsey and Charlotte, her rigging, tackle, apparel, and furniture, and also her cargo, appellants*, vs. *the United States, respondents.—Upon an appeal from the district court for the District of Columbia.*

This court, upon inspecting the proceedings of the district court and the examination of evidence, and after hearing counsel, as well for the appellant as the respondents, do adjudge, order, and decree that the sentence and decree of the district court be reversed, and that the said schooner Betsey and Charlotte, her rigging, tackle, apparel, and furniture, and also her cargo, in the libel mentioned, upon the payment of the duties accruing to the United States, be restored to the appellant without costs. From which decree of reversal the United States attorney prays an appeal to the Supreme Court of the United States, which is granted accordingly.

It is further ordered to be certified that it sufficiently appears to the court here that the collector for the district and port of Alexandria had, at the time of seizure, reasonable cause for seizing the said schooner Betsey and Charlotte, and her cargo.

N. FITZHUGH.

DISTRICT OF COLUMBIA.

Pleas before the honorable judges of the United States circuit court of the District of Columbia, for the county of Alexandria, on the nineteenth day of July, 1810.

Be it remembered that heretofore, to wit, on the 2d day of July, in the year one thousand eight hundred and eight, came Walter Jones, jr., attorney for the United States for the District of Columbia, and sent out a writ of *capias ad respondendum* against William Yeaton, and Robert Young, which said writ, together with the endorsement and marshal's return thereon made, is in the words and figures following:

Capias.

DISTRICT OF COLUMBIA, to wit:

The United States of America to the marshal of the District of Columbia, greeting:

We command you that you take William Yeaton and Robert Young, if they be found within the county of Alexandria in your said district, and them safely keep, so that you have their bodies before the honorable the judges of the circuit court of the District of Columbia, at the court-house in the town of Alexandria at the next court, to answer the United States of America of a plea of debt for seven thousand five hundred and sixty-nine dollars and sixty cents, damage one thousand dollars; and have then and there this wit.

WILLIAM CRANCH,
Chief Judge of said Court, this 2d day of July, 1808.

G. DENEALE, *Clerk.*

For debt and promissory note bail is required.

Return.

Executed 5th August, 1808, and bail released by order of the attorney for the United States. See his order annexed to the writ.

DANIEL MINOR, *D. M.*,
Per W. BOYD, *Marshal.*

Letter of D. Ramsay.

ALEXANDRIA, *August* 6, 1808.

SIR: In the suit brought by the United States on the note of William Yeaton and Robert Young, which I endorsed, it is not on my part desired that they shall be held to give bail; and if bail is not required I shall make no objection to the claim of the United States against me upon my endorsement of that note; but I do promise and

agree my liabilities on that endorsement shall be the same as if bail was required in the aforesaid suit against W. Yeaton.

I am, respectfully, your obedient servant,

DENNIS RAMSAY.

WALTER JONES, Jr.,
Attorney for the United States for the District of Columbia.

The marshal will annex this note to the writ and take an appearance without bail.

W. JONES, Jr.

AUGUST 6, 1808.

Bail Bond.

Know all men by these presents, that we, William Yeaton and Robert Young and are held and firmly bound unto Daniel Carroll Brent, marshall in and for the District of Columbia, in the full and just sum of eighty thousand five hundred and sixty-nine dollars and sixty cents lawful money, to be paid to the said Daniel Carroll Brent, his certain attorney, his heirs, executors or assigns, for the true and faithful payment whereof we bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of August, 1808, and the thirty-third year of our independence.

The condition of the above obligation is such, that whereas the United States of America hath issued out of the circuit court of the District of Columbia for the county of Alexandria a writ of *capias ad respondendum* against the bodies of the above bound William Yeaton and Robert Young, dated the 2d day of July, 1808, in an action of debt for seven thousand five hundred and sixty-nine dollars, damage one thousand dollars; and by an endorsement made on said writ bail was required for the appearance of the said defendants, which writ hath been duly executed on said William Yeaton and Robert Young; now, if the said William Yeaton and Robert Young do, and shall well and truly make their personal appearance before the honorable the judges of the circuit court of the District of Columbia for the county of Alexandria, at the court-house of the said county in the town of Alexandria, at the present court, then and there to answer to the said action, according to the form and tenor of the said writ, and the laws in such cases made and provided require, then the above obligation to be void, else to remain in full force, power and virtue.

Sealed and delivered in the presence of

W. YEATON, [L. S.]
ROBERT YOUNG, [L. S.]

And at another day, to wit, at rules held in the clerk's office of the United States circuit court of the District of Columbia for the county of Alexandria, on the first Monday in November, 1809, (to which day this cause had been regularly continued,) came the parties, by their attorneys, and the plaintiff filed a declaration against the defendant, which declaration is in the following words and figures, to wit:

Declaration.

DISTRICT OF COLUMBIA, *County of Alexandria, to wit:*

The United States of America complain of William Yeaton and Robert Young, in custody, &c., of a plea that they render to the said United States seven thousand five hundred and sixty-nine dollars and sixty cents, of current money, which they owe to the said United States, and from them unjustly detained for this, to wit: That whereas, on the sixteenth day of December, in the year one thousand eight hundred and six, at Alexandria, in the county and District aforesaid, the said William and Robert, by their certain note in writing, commonly called a promissory note, negotiable at the bank of Alexandria, subscribed with their proper hands, and to the court now here shown, the date whereof is the same day and year aforesaid, did jointly and severally promise, ninety days after date, to pay to one Dennis Ramsay, or order, the said seven thousand five hundred and sixty-nine dollars and sixty cents for value received; and whereas, afterwards, to wit, the same day and year aforesaid, at Alexandria aforesaid, the said Dennis Ramsay, by his certain endorsement and assignment in writing, upon the said note subscribed with his proper hand, and to the court now here shown, the date whereof is the same day and year aforesaid, did appoint and order the said sum of money to be paid over according to the tenor and effect of the said note to Daniel C. Brent, marshal of the District of Columbia aforesaid, or his order, and did then and there, for value received, transfer and assign over to the said Daniel C. Brent, marshal as aforesaid, and to his assigns, for the use and benefit of the said United States, the said promissory note, and the said sum of money, and all the claim, right, and interest whatever, of him, the said Dennis Ramsay, to and in the same; and whereas, also afterwards, to wit, the same day and year aforesaid, at Alexandria aforesaid, the said Daniel C. Brent, by his certain endorsement and assignment in writing upon the said note, subscribed with his proper hand, and to the court now here shown, the date whereof is the same day and year aforesaid, did release, transfer, and assign over unto the said United States the said note, and the said sum of money, and all his claim, right, and interest whatsoever to and in the same, of which said endorsements and assignments, in manner and form aforesaid made, they, the said William and Robert, then and there had notice; by reason of which premises and of the statute in such cases made and provided, an action accrued to the United States to demand and have of the said William and Robert the said sum of money. Nevertheless, the said William and Robert, although after requested, &c., did not pay the said sum of money ninety days after the date aforesaid, according to the tenor and effect of the said note, and of the said endorsements and assignments, but have altogether refused and still do refuse to pay the same, whereby the United States are damaged in the sum of ——— dollars, and thereof they bring suit, &c.

W. JONES, Jr.,
United States Attorney.

J. DOE.
R. ROE,
Pledges, &c.

And thereupon the defendants pleaded owe nothing, to which plea the plaintiff replied generally, and issue was joined.

Judgment.

And now at this day, to wit, at a United States circuit court of the District of Columbia, continued and held for the county of Alexandria, the nineteenth day of July, eighteen hundred and ten, came Walter Jones, jr., attorney for the United States for the District of Columbia, and the defendants, by Charles Lee, esq., their attorney, comes and relinquishes their plea and confesses the plaintiff's action. Therefore it is considered that the said United States recover against the said defendant their debt aforesaid, amounting to seven thousand five hundred and sixty-nine dollars and sixty cents, and their damages aforesaid, amounting to one thousand dollars, in manner and form confessed as aforesaid, and also their cost by them about their suit in this behalf expended, and the said defendant in mercy, &c. But this judgment (costs excepted) is to be discharged by the payment of seven thousand five hundred and sixty-nine dollars and sixty cents, with interest from the 16th day of March, 1807, till paid.

The following is a copy of the promissory upon which this action is founded, together with the endorsement and assignments thereon made:

Copy of note.

$7,569 $\frac{60}{100}$. ALEXANDRIA, *December* 16, 1806.

Ninety days after date we jointly and severally promise to pay to Dennis Ramsay, or order, seven thousand five hundred and sixty-nine dollars and sixty cents, negotiable in the bank of Alexandria, value received.

W. YEATON.
ROBERT YOUNG.

Endorsement.

ALEXANDRIA, *December* 16, 1806.

Pay the within sum of 7,569 dollars and sixty cents, according to the tenor and effect of the within promissory note, to Daniel C. Brent, marshal of the District of Columbia, or to his order, for the sole use and benefit of the United States of America; to whom, the said D. C. Brent, I have assigned and do hereby, for value received, transfer and assign to him and his assigns this note and the said sum of money, and all my claim, right, and interest whatsover, in or to the same for the sole use of the said United States.

DENNIS RAMSAY.

ALEXANDRIA, *December* 16, 1806.

I do hereby release, transfer, and assign over to the United States of America, this note and the aforesaid and within mentioned sum of

money, and all my claim, right, and interest whatsoever to and in the same.

DANIEL C. BRENT.

$7,569 $\frac{60}{100}$. ALEXANDRIA, *December* 16, 1806.

Ninety days after date we jointly and several promise to pay to Dennis Ramsay, or order, seven thousand five hundred and sixty-nine dollars and sixty cents, negotiable in the bank of Alexandria, value received.

W. YEATON.
ROBERT YOUNG.

Endorsed—
DENNIS RAMSAY.
DANIEL C. BRENT.

Protest of note.

Know all men that I, Clem. Moore, notary public for the town and county of Alexandria, in the District of Columbia, residing therein, and by law duly admitted and sworn, at the request of the president and directors of the bank of Alexandria, on the nineteenth day of March, one thousand eight hundred and seven, at the counting-rooms of the said W. Yeaton, Robert Young, and Dennis Ramsay, in Alexandria, respectively, have demanded of them payment of the note (of which the above is a copy) which neither of them paid, and requested me to insert the following answer: "That the payment is enjoined by the judge until the suit is finally determined and that they must obey the judge's decree."

Wherefore, the said notary, at the request aforesaid, do hereby protest against the drawers of the said note, and the endorser, Dennis Ramsay, for the non-payment thereof, at Alexandria, nineteenth day of March, one thousand eight hundred and seven.

CLEM. MOORE,
Notary Public.

Fee, $1 70, paid.

The following are copies of a letter from the Secretary of the Treasury, and a decision of the said Secretary, now remaining on file in this record:

Letter of the Secretary of the Treasury.

TREASURY DEPARTMENT, *April* 21, 1809.

SIR: Enclosed I transmit to you a duplicate of my decision in the case of William Yeaton, of Alexandria, merchant.

I am, very respectfully, sir, your obedient servant,

ALBERT GALLATIN.

GEORGE DENEALE, Esq.,
Clerk of the District Court, Alexandria.

Decision of the Secretary of the Treasury, declining to remit.

[Duplicate.]

To all to whom these presents shall come, I, Albert Gallatin, Secretary of the Treasury of the United States, send greeting:

Whereas, a statement of facts, bearing date the twenty-third day of March, 1808, with the petition of William Yeaton, of Alexandria, merchant, thereto annexed, touching a certain penalty and forfeiture incurred under the statute of the United States entitled "An act to suspend the commercial intercourse between the United States and certain parts of the Island of St. Domingo," has been transmitted to the Secretary of the Treasury by the judge of the United States for the District of Columbia, pursuant to the statute of the United States entitled "An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned," as by the said statement of facts and petition remaining in the Treasury Department for the United States may fully appear; and whereas, I, the said Secretary of the Treasury, have maturely considered the said statement of facts and petition, and it doth not appear to my satisfaction that the said penalty and forfeitures were incurred without wilful negligence or any intention of fraud; now, therefore, know ye that I, the said Secretary of the Treasury, in consideration of the premises, and by virtue of the power and authority to me given by the said last mentioned statute, do hereby decide not to remit to the said petitioner the penalty or forfeiture aforesaid nor any part thereof.

[L. S.] Given under my hand and seal of office in the city of Washington this twenty-first day of April, in the year of our Lord one thousand eight hundred and nine, and the thirty-third year of the independence of the United States.

ALBERT GALLATIN,
Secretary of the Treasury.

The following are copies of other papers connected with this record:

Partial remission of forfeiture by the President.

JAMES MADISON, President of the United States of America, to all who shall see these presents, greeting:

Whereas it is represented to me that a certain vessel called the Betsey and Charlotte, whereof James Abbott was master, did, some time in the year 1806, commit a breach of the act of Congress entitled "An act to suspend the commercial intercourse between the United States and certain parts of the Island of St. Domingo," and information thereof having been filed in the district court for the District of Columbia, the said vessel, with her tackle, apparel and cargo, was adjudged by the said court to be duly forfeited to the United States, which sentence was afterwards affirmed by the Supreme Court of the United States; and whereas William Yeaton, the owner of the said

vessel and her cargo, has presented a petition to me praying for a remission of the forfeiture incurred by reason of the premises, and adduced in support thereof the recommendation of a majority of the judges of the Supreme Court aforesaid:

Therefore, be it known that I, James Madison, President of the United States of America, have thought proper to remit, and by these presents do remit, the forfeiture aforesaid, so far forth as the United States are interested therein, on condition, however, that he, the said Yeaton, pays all the costs which have accrued in the case.

In testimony whereof, I have caused the seal of the United States to be hereunto affixed, and signed the same with my hand, at the city of Washington, the twenty-fourth day of June, A. D. 1811, and of the independence of the United States the thirty-fifth.

[L. S.]

JAMES MADISON.

By the President:
JAMES MONROE,
Secretary of State.

Rule.

At a United States circuit court continued and held for Alexandria county, at the court-house of said county, on the 21st day of April, 1813, on the motion of the said defendants, by their counsel, it is ruled that cause be shown on the part of the United States, on Saturday, the thirty-second day of this term, why an execution issued against the bodies of the said defendants, bearing date the 13th day of April, 1813, should not be quashed.

Execution.

THE UNITED STATES OF AMERICA,
District of Columbia, to wit:

To the Marshal of the District of Columbia, greeting:

We command you that you take William Yeaton and Robert Young, if they be found within the county of Alexandria, in your said district, and them safely keep, so that you have their bodies at the clerk's office of the circuit court of the District of Columbia for the county of Alexandria, at the court-house in Alexandria, on the fourth Monday in June next, to satisfy the United States of America in the sum of seven thousand five hundred and sixty-nine dollars and sixty cents, which the said United States of America late, in our said circuit court for the District of Columbia for the county of Alexandria, recovered against them for debt; also one thousand and seventeen dollars and thirty-eight cents, which the said United States, in the same court, were adjudged for their damages, occasioned as well by reason of detaining the said debt as for their costs by them in this behalf expended, whereof they are convict, as appears to us of record; and

have then there this writ. Witness, William Cranch, esquire, chief judge of our said court, this 13th day of April, in the year of our Lord 1813.

G. DENEALE, *C. C.*

[Indorsement]

Memor.—This execution is to be discharged by the payment of seven thousand five hundred and sixty-nine dollars and sixty cents, with legal interest thereon from the 16th day of March, 1807, till paid.

G. DENEALE, *C.*

CLERK'S OFFICE, *April* 13, 1813.

Received of William Yeaton three hundred and eighty-one dollars and eighty-five cents, the costs of the United States against the schooner Betsey and Charlotte and her cargo.

G. DENEALE, *C.*

[Indorsement.]

UNITED STATES
vs.
YEATON & YOUNG.

Memo.—This execution is to be discharged by the payment of one moiety of the debt within mentioned, with interest upon such moiety from the 16th day of March, 1807, till paid, and upon payment also of all the costs and charges of the United States as well in this suit as in the prosecution of the libel against the schooner Betsey and Charlotte and cargo in the district court of the United States for the District of Columbia, and in the circuit court of the same District, and Supreme Court of the United States, upon appeals.

In pursuance of the pardon and remission granted to the defendant, Yeaton, by the President of the United States.

W. JONES, JR.,
U. S. Attorney for the District of Columbia.

ALEXANDRIA, *May* 5, 1813.

Test: G. DENEALE, *C.*

Return.

Executed, and the defendant, Yeaton, committed to the prison bounds, and the defendant, Young, delivered up three hundred and fifty hogsheads of tobacco, in exoneration of his body, which are not sold for want of time, and property released by order of the President of the United States.—(See order filed.)

D. MINOR, *D. M.*,
For W. BOYD, *Marshal.*

Order discharging rule.

At another day, to wit: at a United States circuit court of the District of Columbia, continued and held for Alexandria county, on the 15th day of May, 1813, the attorney for the United States for the District of Columbia appeared, agreeably to a rule of this court, to show cause why an execution issued against the bodies of William Yeaton and Robert Young, bearing date the 13th day of April, 1813, should not be quashed; and on hearing the evidences and arguments of the parties, it is the opinion of the court that the said rule ought to be discharged, and the same is discharged accordingly.

Letter.

UNITED STATES *vs.* YEATON & YOUNG.

Upon Mr. Yeaton's producing the collector's account for amount of duties and all costs and charges, release all General Young's tobacco, except enough to cover $500.

Upon Mr. Yeaton's depositing other property in lieu of the tobacco to be sold, to satisfy whatsoever shall remain in case the government refuses to remit the interest upon the duties, release all the tobacco.

W. JONES, JR.,
United States Attorney.

Receipt.

COLLECTOR'S OFFICE, *Alexandria*, *May* 21, 1814.

Received of William Yeaton thirteen hundred and sixty-nine dollars and fifty-five cents, being the amount of duties on merchandise imported in the schooner Betsey and Charlotte, James Abbott master, from St. Domingo, in the month of November, 1806, exclusive of interest and tonnage duty.

CH. SIMMS, *Collector.*

President's final remission.

James Madison, President of the United States of America, to all who shall see these presents, greeting:

Whereas a certain vessel called the Betsey and Charlotte, whereof James Abbott was master, with her tackle, apparel, and cargo, was adjudged in due form of law by the district court for the District of Columbia to be duly forfeited to the United States for a breach of the act of Congress entitled "An act to suspend the commercial intercourse between the United States and certain ports of the island of St. Domingo," which sentence was affirmed by the Supreme Court of the United States; and whereas, on petition by William Yeaton, the owner of the said vessel and cargo, there was issued an act of remission, under my signature, and bearing date at the city of Washington the 24th day of June, A. D. 1811, and of the independence of the United

States the 35th, relinquishing to the said William Yeaton the forfeiture so adjudged, so far forth as the United States were interested therein, on condition of his paying all the costs which had accrued in the case:

Now, be it known that, upon subsequent petition and further consideration of the premises, I, James Madison, President of the United States of America, have thought proper to superadd to the aforesaid act of remission this present full and entire remission of the said forfeiture, whether accruing to the United States or otherwise; on condition, nevertheless, that he, the said William Yeaton, shall first pay and satisfy the duties payable according to law on articles similar to those so forfeited, as if the same had been legally imported, and all the costs, as stated in the first mentioned act of remission.

In testimony whereof, I have caused the seal of the United States to be hereunto affixed, and signed the same with my hand, [L. S.] at the city of Washington, the 27th day of August, A. D. 1813, and of the independence of the United States the thirty-eighth.

JAMES MADISON.

By the President:
JAMES MONROE,
Secretary of State.

STATE OF VIRGINIA,
County of Alexandria, } *to wit:*

I, Robert A. Sinclair, clerk of the circuit court of Alexandria county, in the State of Virginia, do certify that the foregoing is a true transcript from the records of the late United States circuit court of the District of Columbia for the county of Alexandria, which records, by an act of the Congress of the United States and an act of the general assembly of Virginia, have been transferred to and become the records of the said circuit court of Alexandria county, in the State of Virginia aforesaid.

In testimony whereof, I hereunto subscribe my name and annex the seal of said court this 29th day of June, 1857, and in the 81st [L. S.] year of the Commonwealth.

R. A. SINCLAIR.

VIRGINIA:

I, John W. Tyler, judge of the circuit court of Alexandria county, in the State of Virginia, do certify that Robert A. Sinclair, who hath given the preceding certificate, is clerk of the said court, and that his said attestation is in due form.

Given under my hand this 27th day of July, 1857.

JOHN W. TYLER.

III.

Letter of Secretary of the Treasury.

TREASURY DEPARTMENT, *February* 5, 1859.

GENTLEMEN: I have to inform you, in reply to your letter of yesterday, that there is no evidence in the Department of the appointment of Hugh West as surveyor of the customs of Alexandria, the records having been destroyed in the conflagration of the Treasury buildings in the year 1833.

The certificate of Mr. Hough is herewith returned.

Very respectfully, your obedient servant,

HOWELL COBB,
Secretary of the Treasurg.

Messrs. BRENT & KINZER,
Attorneys, &c:, Alexandria, Va.

IV.

Collector's certificate. [42]

CUSTOM-HOUSE, ALEXANDRIA, *December* 15, 1858.

I, Edlward S. Hough, collector of the customs for the district and port of Alexandria, do certify that, from the records in my office, it appears that Hugh West was, during the year 1806, surveyor of the port.

Given under my hand and seal of the custom-house of Alexandria [L. s.] this 15th day of December, 1858.

EDWARD S. HOUGH,
Collector.

Evidence for the United States. [43]

Letter of Secretary of the Treasury and enclosure, October 6, 1859.

JOHN D. McPHERSON,
Deputy Solicitor.

OCTOBER 11, 1859.

V.

Letter of the Secretary of the Treasury. [44]

TREASURY DEPARTMENT, *October* 6, 1859.

SIR: Your letter of the 3d instant is received. As all the papers and records of the Secretary's office were destroyed at the burning of the Treasury building in 1833, no information in regard to the appointment or the proceedings of customs officers antecedent to that date can be found therein.

Your letter and the petition were referred to the Register, with a request to state all the information in his office in regard to the statement of the petition. It appears by his report of this date, herewith enclosed, that the treasury books show no such payment by the collector of Alexandria as is alleged to have been made to him. If the sum stated was paid to the collector, it does not appear to have been accounted for. The petition is herewith returned, according to your request.

Very respectfully, your obedient servant,

HOWELL COBB,
Secretary of the Treasury.

J. D. McPHERSON, Esq.,
Deputy Solicitor Court of Claims.

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[45] *Report of the Register.*

TREASURY DEPARTMENT,
Register's Office, October 6, 1859.

SIR: In reply to the reference of the letter of John D. McPherson, deputy solicitor Court of Claims, asking information in relation to certain facts alleged in the petition of Edward Sangster before the Court of Claims, I have the honor to inform you that I find nothing in the records of this office tending to elucidate the claim set forth further than that the duties collected and accounted for by the collector at Alexandria for the quarter ending June 30, 1814, was only $18 09; the petition stating that during that quarter, May 21, 1814, Yeaton paid the collector $1,369 55.

I am, very respectfully, your obedient servant,

F. BIGGER, *Register.*

Hon. HOWELL COBB,
Secretary of the Treasury.

[P. S.—OCTOBER 7, 1859.]

Duties received September 30, 1814, (tonnage,) $30 62.
Duties received December 31, 1814, (tonnage,) $27 31.
Duties received March 31, 1815, (tonnage,) $313 63.
Duties received June 30, 1815, $46,996 22, (merchandise.)

C. T. J. *Chief Clerk.*

IN THE COURT OF CLAIMS.

EDWARD SANGSTER, ADMINISTRATOR OF HUGH WEST, *vs.* THE UNITED STATES.

BRIEF OF PETITIONER.

Material facts proved.

First. That Hugh West was, during the year 1806, surveyor of the port of Alexandria, in the District of Columbia.—(Record, p. 41.)

Second. That in the year 1806 the collector of the customs for said district seized, as forfeited to the United States, the schooner Betsey and Charlotte and her cargo, for a violation of the act of Congress of the 28th of February, 1806, entitled "*An act to suspend commercial intercourse between the United States and certain parts of the island of St. Domingo.*"—(2 U. S. L., 351.) Libel being filed, the district judge pronounced sentence of condemnation; which sentence was affirmed on appeal to the Supreme Court of the United States.—(The United States *vs.* The Schooner Charlotte and Betsey, 4 Cranch, 443; Record, pp. 3—15.)

Third. That in pursuance of the said sentence the vessel and cargo were sold, and the net proceeds of sale amounted to $7,432 52, (Record, p. 20;) for which sum the purchaser, Wm. Yeaton, with Robert Young and Denis Ramsey as his securities, gave a note.—(Record, p. 20.)

Fourth. That the United States obtained judgment on said note against Yeaton and Young. That Yeaton was committed to prison on a *ca. sa.* issued on said judgment, and Young delivered to the marshal property in discharge of his body.—(Record, pp. 29—36.)

Fifth. That the Secretary of the Treasury, April 23, 1809, refused to remit the said forfeiture under the act of Congress of 1797.—(1 U. S. L., 506; Record, p. 32.) That the President of the United States, June 24, 1811, remitted the said forfeiture so far as the United States were concerned, (Record, p. 34;) and by another act of remission, August 27, 1813, the President remitted the whole of said forfeiture, on condition that said Yeaton should first pay the duties payable on similar articles according to law the same as if they had been lawfully imported, and also on the payment of costs.—(Record, p. 39.)

Sixth. That in pursuance of the said last mentioned remission the said Yeaton was discharged from prison, and the property of the said Young redelivered to him by the marshal.—(Record, p. 38.)

Seventh. That under the last act of remission the said Yeaton paid to the collector of the said district the sum of $1,369 55 as for the amount of duties.—(Record, p. 39.)

Eighth. That the petitioner is the administrator of Hugh West.—(Record, p. 4.) The authority of the petitioner to act as such administrator is derived from the 10th section, chapter 130, of the Code of Virginia, which is in these words:

"If at any time three months elapse without there being an executor or administrator of the estate of a decedent (except during a con-

test about the decedent's will, or during the infancy or absence of the executor) the court in which the will was admitted to record, or which has jurisdiction to grant administration on the decedent's estate, shall, on the motion of any person, order the sheriff or other officer of the county or corporation to take into his possession the estate of such decedent and administer the same: whereupon, such sheriff or other officer, without taking any other oath of office, or giving any other bond or security than he may have before taken or given, shall be administrator, or administrator *de bonis non* of the decedent, with his will annexed, if there be a will, and shall be thenceforward entitled to all the rights and bound to perform all the duties of such administrator."

The claim of petitioner.

The petitioner will insist that he is entitled to recover one-fourth of the amount of the original forfeiture, to wit, $7,432 53.

This claim grows out of the forfeiture for a violation of the act of Congress of the 28th of February, 1806, (2 U. S. L., p. 351,) which act was continued in force by the act of the 24th of February, 1807.—(Ibid. p. 421.)

This act prohibited "all commercial intercourse between any person or persons resident within the United States, and any person or persons resident within any part of St. Domingo not in possession," &c., of France, and declared that any vessel hired or employed in violation of said act, together with any cargo found on board, should be forfeited.

The 3d section of this act directs "that all penalties and forfeitures incurred by force of this act, and which may be recovered, shall be distributed and accounted for in the manner prescribed by the act" of the 2d of March, 1797, "and may be mitigated in the manner prescribed by the act of" March 3, 1797.

The 91st section of the act of March 2, 1799, (1 U. S. L., p. 697,) enacts the mode of distributing all fines, penalties, and forfeitures, to wit, one moiety to the government, and the other moiety to the collector, surveyor, and naval officer of the port, &c. There was no naval officer at the port of Alexandria.

By the act of March 3, 1797, (1 U. S. L., p. 506,) it is enacted that the Secretary of the Treasury shall "have power to remit such fines, forfeitures, or penalty, or remove such disability or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence or any intention of fraud in the person or persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued upon such terms or conditions as he may deem reasonable and just."

LEGAL PROPOSITION.

After the institution of legal proceedings by the officers of the customs the President by his pardon cannot remit the officers' share.

It is true, that in the case of The United States *vs.* Morris, (10

Wheaton, 246) it was decided that the Secretary of the Treasury has authority to remit a penalty or forfeiture at any time before or after a final sentence of condemnation, until the money is actually paid over to the collector for distribution. But it should be borne in mind that this decision was made under the provisions of an act which not only created the forfeiture and gave an interest therein to the officer, but also conferred on the treasury a power to defeat it.

There is a marked distinction between the remitting power of the Secretary and the power of the President to pardon. The one is the creature of legislative will. By the same will it can be enlarged or diminished, and even annihilated. The other is conferred by the Constitution, and cannot be controlled or restrained by any legislative act.

The power of the President to pardon under the Constitution must, therefore, be tested by that instrument.

By the Constitution (art. ii, sec. 2) it is provided the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

The Constitution itself is silent as to the signification and scope of the word *pardon*. But it seems well settled that the nature and the extent of this power, and the cases in which it may be applied, may be ascertained by means of common-law authorities.

In the case of The United States *vs.* Wilson, (7 Peters, 160,) the Supreme Court, in an opinion delivered by Chief Justice Marshall, say: "As this power had been exercised from time immemorial by the executive of that nation, whose language is our language, and to whose judicial institutions ours bears a close resemblance, we adopt their principles respecting *the operation and effect of a pardon*, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

In *ex parte* William Wells, (18 Howard, 307—311,) the Supreme Court, after quoting the constitutional power vested in the President to grant pardons, and the portion of the opinion of the same court above cited in 7 Peters, say: "We still think so, and that the language used in the Constitution conferring the power to grant reprieves and pardons must be construed with reference to its meaning at the time of its adoption." "At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the Constitution they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon."

"We then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution. This is in conformity with the principles laid down by this court in Cathcart *vs.* Robinson, 5 Peters, 264, 280; and in Flavel's case, 8 Watts & Sergeant, 197," &c.

Now, the authorities clearly show that the King of Great Britain, by virtue of his royal prerogative, had no absolute or unlimited power

of pardoning. The King could not by his deed of pardon release and extinguish a private right. Lord Coke tells us (3 Ins., title Pardons, ch. 105, p. 236,) "by the ancient and constant rule of law, the King cannot make a pardon to the injury and loss of others; that which belongs to another the King cannot give away by his act of grace."

Again, (3 Inst. Pardons, ch. 105, p. 238:) "After an action popular brought *tam pro domino rege quam pro se ipso*, the King cannot discharge but his own part, and cannot discharge the informer's part, because, by the bringing of the action, he hath an interest therein," &c.—(2 Hawkin, P. C. Pardons, ch. 37, sec. 34, p. 553; 5 Bacon, Pardons, p. 287, edition 1813.)

It seems clearly established by the foregoing authorities that the pardon of the King did not reach the private rights and interests of individuals after the institution of the suit.

In the case of The United States *vs.* Lancaster, (4 Washington C. C. R., p. 66,) the President had granted a pardon to Lancaster of all the interest of the United States in a certain bond given to answer for the value of a brig seized by the collector of Delaware, which was condemned for a violation of the embargo law, Judge Washington, who tried the case, said: "The question, then, is whether the pardon of the President, remitting the interest of the United States in and to the penalty and forfeiture of the bond on which the action is founded, can affect the moiety of the penalty claimed by the officers of the customs. According to the doctrine of the common law of England, the King cannot, in the exercise of his prerogative of pardon, defeat a legal interest or benefit vested in the subject." After referring to the power of the Secretary of the Treasury to remit under the act of 1797, the judge proceeds to say: "It certainly does not follow from this that the pardoning power of the President extends to the barring of private inchoate interest, because he derives his prerogative power to pardon under the Constitution, and its extent must be tested by that instrument," &c. Whilst Judge Washington does not decide that the President cannot defeat such private interest, yet it would seem clear from his train of reasoning that the President had no such power. The same point was discussed by Attorney General Clifford in the case of the brig Titi, condemned for an infraction of the first section of the slave trade act of the 20th of April, 1818.—(Opinions of Attorneys General, 4 vol., 573.) And in view of the authorities and circumstances, he recommended the President to remit alone the interest of the United States.

We think it clear from the opinion of the court in the case of The United States *vs.* Morris, (10 Wheat., pp. 90—100,) that the court were of opinion that no such executive power existed whereby the right of the officers could be defeated pending prosecution. Referring to the 3d section of the act of 1797, the court say: "It declares that nothing herein contained shall be construed to affect the right or claim of any person to that part of any fine, penalty, or forfeiture, to which he may be entitled when a prosecution has been commenced, or information has been given, before the passing of this act, or any other act relative to the mitigation or remission of such fines, penalties, or forfeitures, thereby clearly showing that before such power to remit was

given the right of the custom-house officers attached upon the commencement of the prosecution, and could not be divested; but that such right was now modified and made conditional." After referring to the statutes in England of 27 Geo. III and 51 Geo. III, conferring power on the commissioners of the customs to remit before condemnation, the court then say: "It was probably not deemed advisable to confer more enlarged powers upon the commissioners of customs, but that a power somewhere to remit after judgment of condemnation was proper and necessary; and accordingly, by Stat. 54 Geo. III, c. 171, this power is transferred to the commissioners of the treasury."

These citations from United States *vs.* Morris clearly show that prior to the act of Congress of 1790, which first gave the remitting power to the Secretary of the Treasury, there resided no such power elsewhere after the commencement of prosecution.

The rights of the officers under the several acts of Congress referred to are alone, by the provisions thereof, subordinate to the remitting power of the Secretary of the Treasury after the commencement of prosecution.

The act of the 3d of March, 1797, may well be regarded as a contract between the government and the revenue officers, by which the latter become entitled to proportional shares of forfeitures, unless defeated by the remission of the Secretary of the Treasury. The interests thus conferred are regarded as a just reward for diligence and for risk.—(McLane *vs.* The United States, 6 Peters, 404, 426.)

In the present case, by direction of the President, the prosecution ceased and was discontinued, the body of Yeaton was discharged from prison, and the goods of Young delivered in satisfaction of the judgment were restored, whereby the custom-house officers were deprived of all legal means and remedies to enforce their rights. We therefore respectfully submit, that the petitioner has a fair claim upon the government for his intestate's share of the forfeiture.

GEORGE WM. BRENT,
I. LOUIS KINZER, .
Attorneys for petitioner.

IN THE COURT OF CLAIMS.

SANGSTER, ADMINISTRATOR OF HUGH WEST, DECEASED, *vs.* The UNITED STATES.

The act of Congress of 2d March, 1799, entitled "*An act to regulate the duties on imports aud tonnage,*" sec. 91, directs the mode of distributing all fines, penalties, and forfeitures, accruing under that act, as follows: one moiety to the United States, and the other moiety to the collector, surveyor, and naval officer of the district, or such of said officers as may be in each district.—(Stats. at Large, L. & B., vol. 1, p. 697.)

The act of the 3d of March, 1797, entitled "*An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities, &c.,*"

provides a means for obtaining a remission or mitigation of fines, &c., by application to the Secretary of the Treasury, and confers the power upon that officer.—(Ibid., p. 506)

Act of 3d March, 1797, continued without limit by act of 11th February, 1800.—(Stats. at Large, L. & B., vol. 2, p. 7.)

The present case is a claim growing out of a forfeiture incurred for the violation of the act of 28th February, 1806, entitled "*An act to suspend commercial intercourse between the United States and certain parts of the island of St. Domingo*, (Stats. at Large, vol. 2, p. 351,) which act was continued in force by the act of the 24th of February, 1807.—(Ibid , p. 421.)

By the 3d section of the act of 28th February, 1806, the forfeitures thereunder were made recoverable and distributable under the act of 2d March, 1799, and might be remitted under the act of 3d March, 1797, above mentioned.

The remission of the forfeiture in this case having been made by the *President of the United States*, it was not made under the provisions of the remitting act of the 3d of March, 1797, because that act grants the power exclusively to the Secretary of the Treasury. Conceding that the power is vested in the President to grant such remissions, the question arises, whence is this power derived? The Secretary of the Treasury derives his power from certain legislative provisions contained for the most part in the same laws which create the forfeitures. We find no such provisions, however, conferring the power upon the President, and we therefore conclude that his power must be derived from that clause in the Constitution authorizing him to "grant reprieves and pardons for offences against the United States." Justice Story, in his Commentaries on the Constitution, derives this power in the President from the clause in the Constitution above referred to.—(Story's Com. on Const., vol. 3, p. 353–4.)

The effect, therefore, of the President's pardon or remission of a forfeiture is not bounded or governed by any legislative enactments, as is the case in pardons or remissions made by the Secretary of the Treasury. And it will be seen that in cases of this kind the power vested in the Secretary of the Treasury extends over interests not affected or controlled by the power of the President. Upon the authority of *The United States* vs. *Morris*, (10 *Wheaton*, 246,) we claim that the interest of the revenue officers in the subject forfeited was, from the time of the seizure until condemnation, merely inchoate; and that this inchoate right became consummated upon final judgment of condemnation. Yet this right of the revenue officers was subject to be defeated at any time before the proceeds were actually received for distribution, by the remission of the forfeitures by the Secretary of the Treasury.

This apparently unlimited power of the Secretary of the Treasury to defeat the interests of the revenue officers is derived from the legislative enactments which confer the power of remission upon him.—(Justice Johnson in U. S. *vs.* Morris, 10 Wheat., 246.)

It seems clear and well established, therefore, that under the legislative enactments the interests of the revenue officers may be affected by the remitting acts of the Secretary of the Treasury, even

after judgment of condemnation. It remains to inquire, does the remitting power of the President extend so far? and can he, by the exercise of his constitutional prerogative, deprive third parties of their ascertained interest in the forfeiture? We think not. As the President acts under his constitutional powers alone, irrespective of any legislative enactments, it will hardly be pretended that his powers under the Constitution can be extended by the mere construction of laws which confer upon him no authority whatever. The effect of the President's pardon not being extended by legislative enactments so as to direct the interests of third parties in the forfeiture or penalty, it is like the pardon of the King at common law, which cannot defeat such interests.—(5 Bac. 286–287; Chitty C. L. 742, 764; 12 Rep. 29–30; Attorney General's Opinions, vol. 4, p. 573, vol. 5, p. 532; exparte, Wells, 18; Howard, 307.)

This power of the President to remit forfeitures was discussed but not decided in The United States *vs.* Lancaster, (4 Wash. C. C. R., p. 64;) and that he cannot, in the exercise of his pardoning power, defeat the interests of third parties, may be inferred from the reasoning of the court in that case.

The act of 3d of March, 1797, may well be regarded as a contract between the government and the revenue officers, under which the latter become entitled, upon condemnation, to one moiety of the forfeiture, subject to be defeated or released by the Secretary of the Treasury only. The government prosecutes in its own name, but for the use of the parties in interest, and neither party can reap an advantage to the exclusion of the other. The officers cannot sue in their name.—(U. S. *vs.* Morris, 10 Wheat., 100.)

By the pardoning act of the President in this case, the prosecution, by his direction, ceased, and was discontinued, and the revenue officers thereby deprived, not only of their vested rights, but of all power to enforce them. In good faith the government should have continued the suit for the benefit of the revenue officers, whose share or interest in the forfeiture was unaffected by the pardon; and failing to do this, we submit that the petitioner has a fair claim upon the government for his intestate's share of the forfeiture.

In reference to the alternate claim set up in the petition for one-fourth the amount actually received by the government in discharge of the condition of the pardon, we submit, upon the authority of McLane *vs.* The United States, (6 Peters, 427,) that as no duties, as such, could be lawfully charged or collected upon the forfeited merchandise, (they being illegally imported,) the reservation of the duties to the United States was in effect a reservation out of the forfeiture. In other words, the reservation in the case being in point of law a reservation of a part of the forfeiture, the petitioner claims his intestate's one-fourth of that sum, upon the principle established in McLane's case, that "whatever the government has reserved out of the thing forfeited was reserved as well for the seizing officers as for itself, and is distributable accordingly."

BRENT & KINZER,
Attorneys for Petitioners.

IN THE COURT OF CLAIMS.

EDWARD SANGSTER, ADMINISTRATOR OF HUGH WEST, *vs.* UNITED STATES.

SOLICITOR'S BRIEF.

Material facts stated in the petition.

First. That Hugh West in 1806, and before and afterwards, was surveyor of the customs at Alexander, in the District of Columbia.—(Record, p. 2.)

Second. That in the year 1806 the collector of the customs for said District seized the schooner Betsey and Charlotte and her cargo, and by a decree of the district court they were declared forfeited under the act of February 28, 1806, (2 U. S. L., 351,) which judgment was affirmed in the Supreme Court of the United States, and reported in 4 Cranch, 443.—(Record, p. 2.)

Third. That in pursuance of said decree the vessel and cargo were sold, and after deducting expenses of sale there was left the sum of $7,432 53.—(Record, p. 2.)

Fourth. But that, instead of paying in money the amount of said sale, the purchaser, one Yeaton, with Robert Young and Dennis Ramsey, gave their promissory notes for the purchase money.

Fifth. That judgment was obtained against Yeaton and Young on said notes by the United States.

Sixth. That Yeaton was committed to prison on execution issued on said judgment, and that Young delivered up his property in exoneration of his body.

Sixth. That the said forfeitures were collectable under the act of 1806, and were distributable under the act of 1797.—(1 U. S. L., 506.)

Seventh. That the Secretary of the Treasury, April 2[illegible], 1809, refused to remit said forfeiture under the act of 1797; but that the President of the United States, June 24, 1811, remitted the said forfeiture as far as the United States were concerned, and by another act of remission, dated August 27, 1813, did remit the whole of said forfeiture, on condition that the importer should first satisfy and pay the duties payable on similar articles according to law, the same as if they had been lawfully imported, and also on payment of the costs specified in the first act of remission.

Eighth. That, under this last act of remission, the importer paid the sum of $1,369 55 as for the amount of duties, and the United States received the same, for their own use, through the proper accounting officers.

Ninth. The petitioner claims one-fourth of the amount of the original forfeiture, or, if this is not allowable, then he insists that he is entitled to one-fourth of the amount of duties paid to the United States under the second remission by the President, with interest thereon from the time of the receipt of the same.

Material facts as understood by the Solicitor.

First. The principal facts set out in the petition are believed to be true, except that no money was received through the accounting officers, but the conclusions of law drawn from them are questioned and denied.

Second. On the 28th of February, 1806, Congress passed a law to suspend intercourse between the United States and St. Domingo, (2 U. S. L., 351.) The first section of this law is as follows:

"That all commercial intercourse between any person or persons resident within the United States and any person or persons resident within any part of the island of St. Domingo, not in possession, and under the acknowledged government of France, shall be, and is hereby, prohibited; and any ship or vessel owned, hired, or employed, wholly or in part, by any person or persons resident within the United States, and sailing from any port in the United States after due notice of this act at the custom-houses, respectively, which, contrary to the intent hereof, shall be voluntarily carried; or shall be destined to proceed, whether directly or from any intermediate port or place, to any port or place within the island of St. Domingo, and not in possession and under the acknowledged government of France; and also any cargo which shall be found on board such ship or vessel when detected and interrupted in such unlawful purpose, or on her return from such voyage to the United States, shall be forfeited, and may be seized and condemned in any court of the United States having competent jurisdiction."

"SEC. 3. That all penalties and forfeitures incurred by force of this act, and which may be recovered, shall be distributed and accounted for in the manner prescribed by the act" of the 2d of March, 1799, "and may be mitigated in the manner prescribed by the act of" March 3, 1797.

LEGAL PROPOSITIONS.

FIRST. *The act complained of as the occasion of forfeiting the goods in question was an offence against the laws of the United States.*

The offence was defined, and the consequences of committing it, by an act of Congress. The legislature chose to make intercourse with a certain portion of St. Domingo an offence, and it imposed certain forfeitures as the consequence of violation. The act authorized the Secretary of the Treasury, under the act of 1797, to the forfeitures. But this neither limited nor took away the President's power under the provision in the Constitution, which says, "he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

The provision authorizes the President to pardon.

SECOND. *The President may, in granting pardons, impose conditions in his discretion.*

This power has been the subject of contest; but has been finally settled, after full argument by the Supreme Court of the United States. In *The United States* vs. *Wilson* (7 Pet., 162) this principle was put forward, and was finally determined in *ex parte William Wells*, (18 How., 307,) when it was the only material question involved.

It is thus settled, in harmony with numerous decisions quoted from State tribunals, that the pardoning power may impose conditions within its discretion. In this the court recognized and followed English authority, where conditional pardons have ever been considered and treated as legal.

THIRD. *The right to pardon extends to the whole offence, and may be exercised until the proceeds of the forfeiture are actually collected and paid over to the collector or other officer for distribution.*

The power of remission by the Secretary, under the act of 1797, (1 U. S. L., 506,) is a limited one, and rests exclusively upon the ground that the offence was unintentionally committed. It is in these words: "who shall have power to mitigate or remit such fine, forfeiture, or penalty, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred *without wilful negligence, or any intention of fraud in* the person or persons incurring the same." This provides relief against negligence, when not wilful, and against mistakes. This power may be exercised down to the period when the persons entitled to share in the penalty or forfeiture has a right to demand the same. This time is indicated in the 91st section of the collection act of 1799, (1 U. S. L., 697,) to which the act of 1806, now under consideration, refers, and is as follows:

"That all fines, penalties, and forfeitures recovered by virtue of this act (and not otherwise appropriated) shall, after deducting all proper costs and charges, be disposed of as follows: one moiety shall be for the use of the United States, and the other moiety shall be divided between, and paid in equal proportions to, the collector and naval officer of the district and surveyor of the port wherein the same shall have been incurred, or to such of the said officers as there may be in the said district."

This contemplates that the money shall be made by the ministerial officer and paid into court, and the fees of the marshal, clerk, and district attorney deducted, and then the distribution made by the order of the court.

The 89th section (1 U. S. L., 695) extends to all penalties, and, it is presumed, to fines, penalties, and forfeitures; and if so, then the balance collected is taken from the clerk of the court and is distributed by the collector. This section provides "that all penalties accruing by a breach of this act shall be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same; * * * * and (the collector) is, moreover,

authorized to receive from the court within which such trial is had, or for the proper officer thereof, the sum or sums so recovered, after deducting all proper charges to be allowed by the said court; and on the receipt thereof, the said collector shall pay and distribute the same without delay, according to law, and transmit, quarter-yearly, an account of all moneys by him received for fines, penalties, or forfeitures during such quarter."

Under this section the Supreme Court held, in *The United States* vs. *Morris*, (12 Wheat., 246,) that "no part of the act warrants the conclusion that the right of these officers becomes absolute by the condemnation; but, on the contrary, the plain and obvious interpretation is, that the right does not become fixed until the receipt of the money by the collector." The reasons for this conclusion are given by the court at great length, and their conclusions were followed in the case of *McLane* vs. *The United States*, (6 Pet., 404.)

The solicitor insists that until the money is actually received by the collector the Secretary can remit and the President can pardon. Until the money is actually made, the offence is unatoned. Receiving security is not payment. Until the payment of the money, in case of a penalty or fine, or the money is realized out of a forfeiture, there remains something between the government and the offender not finally settled or closed; and what thus remains the President can wipe out by his pardon; and then the offence will be gone as much as if it never had existed.

In the present case no money was actually made on the sale of the vessel and cargo, nor out of the notes which were given on such sale. Nothing was realized from either by the United States. The collector received nothing to distribute, and consequently there was nothing which could be paid to the surveyor. It follows that up to this point nothing had been received that could be divided, and consequently no claim can now been sustained for money received.

FOURTH. *The surveyor was not entitled to any portion of the duties paid as a condition of pardon or remission.*

The President's final remission or pardon (Record, p. 40) was upon the condition of paying all costs, and paying and satisfying "the duties payable according to law on articles *similar* to those forfeited, as if the same had been legally imposed."

The forfeited cargo had passed into the country for consumption without paying duties. In this final act of pardon or remission the President imposed a condition that all costs which had accrued in the proceedings should be paid, and that duties on articles *similar* to those forfeited, as if the same had been legally imposed. The amount thus received was not a fine, penalty, or forfeiture arising under the act of 1806, or under the revenue laws, or any other laws, and consequently it cannot be distributed as such. The costs stand on the same footing as these duties, they being a part of the condition imposed and which had to be complied with before the remission could take effect. But the absurdity of such a claim prevented the plaintiff setting it up in his petition.

The case of *McLane* vs. *The United States* (6 Peters, 404) is not adverse to these views. In that case the statute had *prohibited the importation* of the goods, and the remission by the Secretary was conditioned for the payment of double duties on the goods imported, provided under a law subsequently passed. The court held that there could be no payment of duties on goods that were prohibited from being imported by an act of Congress, and that under the circumstances the intention of the Secretary was to reserve a part of the forfeiture to the use of the United States, and that reference was made to double duties under a subsequent law for the mere purpose of ascertaining the extent of the forfeiture to be retained. And inasmuch as the money thus paid was a part of the forfeiture, and not duties, the collector was entitled to share in the same. In the present case there was no prohibition against the importation, nor was the condition that the duties should be paid on the goods found on board the offending vessel. The condition was, that the remission should be complete and perfect on payment of duties on similar articles according to law. From this it is manifest that it was not the intention of the President to exact duties on the same goods, or to retain a portion of the forfeiture, but to impose what he deemed a reasonable and lawful condition for the act, grace, and favor which he performed. His power to impose a condition cannot now be questioned, having been settled by the highest judicial authority. Unless the plaintiff establishes (and he has not done so) that this condition was, and was intended, to retain a portion of the forfeiture, he has no possible right to participate in it. This court cannot construe the condition to be anything but what it purports to be, and cannot find an intention that is excluded by the provisions of the instrument. The court must adopt what it says as its meaning, and cannot interpolate words to give a different one.

FIFTH. *If the original forfeiture was lost from necessity or bad management of executive ministerial officers, that fact does not confer upon the plaintiff the right to recover.*

It cannot be denied that the sale of the vessel and cargo on credit was unauthorized by law; but that fact conferred no rights upon the officers of the customs. Their rights did not accrue before the money was actually received by the collector. The marshal may have become liable for neglect of duty; but if he were liable, still the government was not his surety. Whether it was the duty of the district attorney to pursue the marshal for this error cannot arise in this suit. We are not trying him or the marshal. If the money ought to have been made, certainly it has not been. There is no law making the government liable for the omissions of duty by ministerial officers. Such omissions may have laid the foundation for actions against them. But there is no law requiring any one to institute them; and if there were such a law, the non-observance of it would not entitle the plaintiff to claim what he may suppose could or might have been realized under it. The government may have mismanaged the whole proceedings from their institution to their conclusion, still that would confer no legal right upon the officers of the customs, because

their rights are subject to all the contingencies which may result from errors of the district attorney, the court, jury, and marshal, and the Secretary in remitting, and the President in pardoning. The government is not surety for either. There may be grievous cause of complaint, authorizing removal or impeachment; but if neither are exercised, no civil rights result therefrom. If the President wrongfully grants a pardon, no cause of action can grow out of the act. There may be a responsibility by way of impeachment, or generally to the public; but these cannot lay the foundation of a legal right in favor of any person in particular. In this case the marshal acted without legal authority in taking notes; but no one prosecuted him for his fault. If loss followed, no one but himself or his sureties was responsible. The government is not responsible for the consequences. Hence the plaintiff cannot complain, and charge the United States for what he may think he has lost.

SIXTH. *This is a State claim, barred by all statutes of limitation, and presumed to have been paid by the rules of common law.*

It is almost fifty years since the occurrences upon which this claim is founded. The ordinary statutes of limitation is six years. Such a statute would have run more than eight times since the transaction in question. The presumption of payment would have arisen almost three times since. In this case there is not even an apology for not having applied to Congress or the proper department for relief. As far as this record shows, the claimant has laid by some forty-six years before making an attempt to secure what he now claims. During such an interval much, if not all, the evidence in favor of the United States may have perished or been lost. The burnings of the treasury has swept away nearly all evidence in old cases. After such a period has elapsed, it is not probable that there is any person living who knows and understands the transaction, much less is it probable that the United States will know who to call upon to make proof concerning it. The policy which dictated the common law rule, that even sealed instruments might be presumed to have been paid in twenty years, must apply with great force in a case where, practically, those who contracted the debt, or otherwise occasioned the act or matter complained of, are so often changed as to render it impossible to ascertain what the real facts are in very many cases. It is supposed that there is not left in office one man who served under Washington, and scarcely one who served under Adams. But very few who were connected with the administration of Jefferson. Of those who served under Madison but a small number remain; nor are there many who were connected with Monroe's administration; nor is the list large who practically participated with that of General Jackson in the occurrences from 1829 to 1837. Even those who served with Mr. Van Buren have been reduced to an inconsiderable number. It is impossible now to find men who understand transactions occurring from ten to seventy years since in the various departments of our federal government. Hence the necessity and propriety of raising the present objection. Between private individuals such delay would prevent any recovery. The reason is much stronger

when applied to transactions with the government. If this is so, it will bar the present claim.

SIXTH. *There is no evidence that the plaintiff is administrator of Hugh West, under whom he claims.*

The plaintiff does not show that letters of administration were granted to him, nor that he had given bail or taken any of the steps necessary to make him an administrator entitled to act.

The extract from the records shows that the administration was committed to the sheriff of the county of Alexandria in his official capacity. There is no evidence that, after the order recited, the plaintiff accepted the appointment, or performed what was necessary to authorize him to act in his official capacity as administrator. If the sheriff was appointed as such, all rights follow that officer, and do not continue to pertain to the individual who was then sheriff.

SEVENTH. *That if the United States have received money which ought to be paid to Hugh West or his administrator, it is to be presumed the proper department will pay or cause to be paid on proper application, and that until it is demanded a suit cannot be brought for the same.*

The petition states (p. 2) that "so far as he (the petitioner) is informed and believes, no action has ever been had in Congress, or by any of the departments of the government, upon the said claims, or either of them."

If there is anything due, it is to be presumed it will be readily paid on application; and until demand has been made, no suit can be sustained.

Dated November 5, 1859.

R. H. GILLET, *Solicitor.*

IN THE COURT OF CLAIMS.

March 5, 1860.

HUGH WEST'S ADMINISTRATOR *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

Hugh West, the petitioner's intestate, was surveyor of the customs for the district of Alexandria during the year 1806. On the 24th day of November, in that year, Charles Simms, the collector of that district, seized a schooner called the Betsey and Charlotte, and her cargo, for a violation of the act of Congress, entitled "An act to suspend the commercial intercourse between the United States and certain parts of the island of St. Domingo," approved February 28, A. D. 1806. Proceedings were then instituted against the schooner and cargo in the district court of the United States, held in Alexandria;

and on the 11th day of December, A. D. 1806, they were, by the sentence of that court, condemned and declared forfeited. By the same sentence a sale was directed, and afterwards the schooner and cargo were sold in pursuance thereof at the price of $7,569 60. The expenses of the sale being $137 07½, the net proceeds thereof were $7,432 53.

On the 17th day of January, A. D. 1807, the sentence of the district court was reversed by the circuit court for the District of Columbia; but subsequently the sentence of the circuit court was reversed, and that of the district court affirmed by the Supreme Court of the United States.

The sale made by the marshal was on a credit of ninety days, and William Yeaton, the purchaser, and one Robert Young, gave their note for the purchase money. A suit was afterwards instituted by the United States against them on the note in the circuit court for the District of Columbia, where a judgment was rendered against them for the full amount thereof with interest and costs.

Application was made under the act of March 3, A. D. 1797, to the Secretary of the Treasury for a remission of the forfeiture, but it was refused. Afterwards the President of the United States remitted it "so far forth as the United States are interested therein." A writ of *capias ad satisfaciendum* was subsequently issued against William Yeaton and Robert Young on the judgment against them. Yeaton was committed to the prison bounds; and Young delivered to the marshal three hundred and fifty hogsheads of tobacco, and was discharged from custody. In this state of things, the President, on the 27th day of August, A. D. 1813, granted a "full and entire remission of the said forfeiture, whether accruing to the United States or otherwise, on condition, nevertheless, that he, the said William Yeaton, shall first pay and satisfy the duties payable according to law on articles similar to those forfeited, as if the same had been legally imported, and all the costs."

The petitioner alleges that on the 21st day of May, A. D. 1814, William Yeaton paid to the collector the sum of $1,369 55, the amount which would have been payable for duties on articles similar to those forfeited if they had been legally imported, and that the same was paid to the United States. But at the hearing, the petitioner, admitting that this allegation is not sustained by the evidence, abandoned all claim thereon.

The petitioner further alleges, that but for the remissions granted by the President, and the failure of the United States to prosecute the judgment against Yeaton and Young, the whole amount thereof would have been made. He claims the sum of $1,858 13, the one-fourth of the net proceeds of the sales of the forfeited schooner and cargo.

There can be no doubt, we think, that the President cannot by a pardon take away a vested right of a citizen. In England it is a settled rule that the king cannot, by any dispensation, release, pardon, or grant whatsoever, bar any right, whether of entry or action, or any legal interest, benefit, or advantage whatsoever before vested in the subject.—(2 Hawk. P. C., ch. 37, § 34, p. 543.) When an offence is created by statute, which also provides that the offender shall be liable

to the action of the party grieved for all damages which he may sustain thereby, the action cannot be taken away by the king's pardon. Upon the same principle, when by statute a penalty is recoverable by any person who will sue for the same, the one-half thereof for the use of the king and the other half for the use of the party suing, it is considered that, after action brought, the informer's right vests, and that the king cannot then by a pardon release it.—(*Ibid.*) These are sound principles, and as applicable to the pardoning power of the President as to that of the king of England. Private rights once vested are as much beyond the reach of the government in the United States as in England. But these principles have no application to this case. The proceeding against the Betsey and Charlotte and cargo was not a popular action, brought as well for the use of the United States as for the custom-house officers, or at all analogous to it. It was instituted by the authority of the United States, and in their name, and was prosecuted subject to their absolute control, and as between them and the custom-house officers no rights of the latter ever vested.

Under the acts of Congress which have been cited at the bar, the rights of the seizing officer to forfeitures *in rem*, as between him and the party who has incurred the forfeiture, attaches on seizure, and is ascertained and consummated by the judgment.—(Jones *vs.* Shore's Executors, 1 Wheat. R., 462; Van Ness *vs.* Buel, 4 Wheat. R., 74.) But as between the seizing officer and the government, he is the agent of the latter from the moment of the seizure till the termination of the suit; and his own will is bound up in the acts of the government in reference to the suit. By the very act of seizure he agrees to become a party to the suit under the government, for in no other manner can he show an authority to make the seizure, or to enforce the forfeiture. If the government refuse to adopt his acts, or waive the forfeiture, there is an end to his claim; he cannot proceed to enforce that which the government repudiates.—(By the court in Gelston *vs.* Hoyt, 3 Wheat. R., 319.) The rights and interests of the custom-house officers, therefore, are subordinate to the authority of the United States over the forfeiture. Although those officers are parties in interest, yet they are not parties on the record, and their rights are not vested. Their interest is conditional merely, and the condemnation only ascertains and determines the fact on which the right is consummated, should no remission take place. The forfeiture is to the United States, and sued for in their name; and the rights of the custom-house officers do not become vested until the money arising from the forfeiture is received by the collector for distribution. Hence the Secretary of the Treasury may remit the forfeiture at any time before the money arising from it has actually reached the collector's hands. The condemnation is not to the officers, but to the United States; the officers are no parties to the judgment, and their rights depend upon, and are governed and controlled by, the acts of Congress, which create and regulate them. (United States *vs.* Morris, 10 Wheat. R., 246, 289–296; McLane *vs.* United States, 6 Peters' R., 404.)

In this case, the money had not even been made, but was merely in process of collection by a suit at law, when the President interposed

and granted a full remission. No right of the petitioner's intestate had then vested. His rights were still conditional and wholly dependent on the action of the government. He could rightfully claim nothing, and was entitled to nothing, unless the money should actually be received by the collector. If its payment should be arrested by any of the methods known to the law, that was a contingency which, in the contemplation of the very act of Congress under which the petitioner claims, might defeat his rights. The obvious intent of the act in postponing the vesting of the rights of the officers till the actual receipt of the money by the collector for distribution, is, that punishment may be visited only on those who shall be found guilty by the judicial tribunals, and in whose behalf the executive shall not see fit to interfere. There can be no doubt that at the very time when the President interposed, if he had not acted, the Secretary of the Treasury might have reviewed and reversed his own decision, and granted an absolute remission. But the only difference between the power of the President and that of the Secretary is, that the one is derived from the Constitution and the other from a statute; and the former extends to all cases except that of impeachment, whilst the latter is limited and restricted to the particular case named in the statute. In a word, the President has all the powers of the Secretary of the Treasury in the premises and more. It is plain, we think, that no vested right of the petitioner's intestate stood in the way of the exercise of the pardoning power of the President, and that his action in the premises was lawful.

Our opinion is, that the petitioner is not entitled to relief.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 251.

ALEXANDER M. JACKSON, ADM'R OF JOHN GORMAN, DECEASED.

[To accompany Bill H. R. C. C. No. 99.]

MAY 2, 1860.—Committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled.

The Court of Claims respectfully presents the following documents as the report in the case of

ALEXANDER M. JACKSON, ADM'R OF JOHN GORMAN, *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Evidence of the claimant, transmitted to House of Representatives.
3. Evidence offered by the government, transmitted to House of Representatives.
4. Claimant's brief.
5. Solicitor's brief.
6. Opinion of the court allowing claimant $603 62.
7. Judge Loring's dissenting opinion.
8. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this first day of May, A. D. 1860.

[L. S.]

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

UNITED STATES COURT OF CLAIMS.

JOHN GORMAN *vs.* THE UNITED STATES.

To the Court of Claims:

Your petitioner, John Gorman, a resident of Santa Fé, in the Territory of New Mexico, would respectfully state to the court that he is a citizen of the United States, and was engaged in the service of the United States, taking the census of the county of Rio Arriba, New Mexico, under an act of Congress approved 23d of May, 1850, Statutes at Large, vol. 9, p. 428; and under the act of Congress approved 30th of August, 1850, Statutes at Large, vol. 9, p. 445. Your petitioner further states, that under the act of 23d of May, 1850, he was entitled for his services to the sum of $603 62, and his account was made out accordingly by the Census office, and duly certified for payment on the 18th day of April, 1851. Your petitioner further states, that under the act of 30th of August, 1850, he was allowed for said services the further and additional sum of $603 62, and the account therefor was also made out by the Census office and duly certified for payment on the 30th day of May, 1851, making thus due your petitioner from the United States for the services aforesaid the sum of $1,207 24. Your petitioner further states, that of the sum thus due your petitioner, without any authority from your petitioner, and without his knowledge, the Superintendent of the Census, Hon. J. C. G. Kennedy, paid over to one Charles H. Merritt, United States marshal of the Territory of New Mexico, the sum of $603 62, on the 18th of April, 1851, and on the 3d of May, 1851, the further sum of $603 62, making in all the said sum of $1,207 24 so paid to Merritt, of the money of your petitioner. Your petitioner further states, that the said Merritt never has paid to your petitioner any part of said sum of money; and the United States, on being advised by your petitioner that the said Merritt had not paid, your petitioner was, in a letter of 28th June, 1852, furnished by Mr. Jos. C. G. Kennedy with two receipts for the sum of $603 62, with directions, if Mr. Merritt had not paid over to your petitioner any portion of the sum due him, to sign said receipts and return them to the Census office, and upon their coming to hand a draft would be forwarded to your petitioner for the amount; and your petitioner avers that he did, in good faith, in pursuance of the instructions in said letter, forward said receipts, duly signed, stating also that no part of the amount due your petitioner from the United States had been paid by the said Merritt, and in letter of 4th of February, 1853, there was sent to your petitioner a draft on the Bank of Commerce, New York, for $603 62, which was duly received by your petitioner; but the remaining sum of $603 62 due and owing was not then, nor has it since been, paid to your petitioner, but remains wholly unpaid and unsatisfied, and payment of the remaining sum of $603 62 is now refused by the government upon the ground—1st, that on the 3d day of September, 1851, Charles H. Merritt enclosed to the Census office the receipts of your petitioner for the payment of the full amount due your petitioner for his services; 2d, that your pe-

titioner having, on the 14th day of January, 1852, taken a note from the said Merritt for the sum of $1,351 78, in which note was included the sum of $1,207 24 due to your petitioner from the United States, the liability of the United States no longer exists, and that your petitioner must look only to said Merritt for payment. Your petitioner further avers, that the United States is not discharged from its liability for either of the reasons aforesaid, because your petitioner avers that said receipts of 3d September, 1851, never were executed by him to the said Merritt; and if said receipts were in fact executed by your petitioner they were executed without consideration and without any payment in fact having been made to your petitioner. Your petitioner further states, that he is not barred from his right to recover the balance due him upon the second ground, because said note was not given or received in payment or satisfaction of the claim of your petitioner against the United States, and no part of said note has ever been collected by your petitioner; and the said Charles H. Merritt, after due diligence to collect the money of him by your petitioner, has proved wholly insolvent, and unable to pay any part of said note. Your petitioner further states, that the subject-matter of this claim has been before the Department of the Interior, and has been refused payment on the grounds above stated. Your petitioner, for a history of the facts, and the action of the Department of the Interior upon said claim, refers to the report of Mr. Moses Kelly, made February 11, 1856, and the reply thereto of your petitioner, through his counsel, dated September 2, 1856, and the affidavits, letters, and papers on file in said department, and alluded to in said report and the reply thereto—a copy of said report and the reply thereto is hereby made a part of this petition, marked as exhibits A and B herein. Your petitioner avers, that inasmuch as the government constituted Merritt her agent to pay your petitioner, without his knowledge or consent, the government must bear the loss, if any accrues by the faithlessness of that agent. Your petitioner avers, that there is yet due him, and unpaid, the said sum of $603 62, for services rendered in taking the census for Rio Arriba county, New Mexico, in the year 1850, with interest from 18th of April, 1851, for which amount he asks the court to report a bill for his relief. All of which is respectfully submitted.

JOHN S. WATTS,
Attorney for Claimant.

No. 812.

JOHN GORMAN *vs.* THE UNITED STATES.

And now comes John T. Watts, attorney for the claimant, and suggests to the court the death of the said John Gorman since the commencement of this suit, and now produces to the court letters of administration, duly granted upon the estate of said Gorman by the probate court of Santa Fé county, in the Territory of New Mexico, to Alexander M. Jackson, and now moves the court that the said

Alexander M. Jackson be permitted as such administrator to prosecute the said suit.

JOHN T. WATTS, *Attorney.*

Letters of administration.

Whereas Alexander M. Jackson has applied for and been granted letters of administration upon all the estate of John Gorman, late of the county of Santa Fé and Territory of New Mexico, who died intestate; and whereas the said Alexander M. Jackson has duly executed and placed on record, in the office of the clerk of the probate court of said county, his approved bond well and faithfully to perform all the duties required of him as administrator of the estate of John Gorman, deceased, aforesàid, by the law, and has complied with all the other legal requisites in the premises:

Be it therefore known that the said Alexander M. Jackson is by these presents fully recognized as such administrator, and is duly authorized and empowered to do and perform all the duties required of him by law, and a faithful administration of the said estate, and this letter of administration is issued to him in testimony of the fact.

Witness my hand and the seal of the probate court, by order of the Hon. Antonio Matias Ortiz, judge of the said probate court, [L. S.] in the city and county of Santa Fé, and Territory of New Mexico, this the 19th day of December, A. D. 1858.

DAVID J. MILLER,
Clerk of the Probate Court aforesaid.

TERRITORIO DE NUEVO MEJICO, }
Condado de Santa Fé. }

Yó Facundo Pino, Escribano de la Corte de Pruebas en y por el Condado de Santa Fé, en dicho Territorio; certifico que las antecedentes letros de administracion son una verdadena copia fiel y completa sacadas del libro que estenido en esta oficina con el fin de en registrar tules letras.

En testimonio de lo cual pongo mi nombre y el sello de la dicha Corte en Santa Fé hoy el dia 28 de Enero del año del Señor de 1860.

FACUNDO PINO,
Esç'bo de la Corte de P'bas.

TERRITORY OF NEW MEXICO, }
County of Santa Fé, } *ss.*

On the 4th and 12th days of January, A. D. 1858, personally came John W. Dunn, George H. Estes, and Joab Houghton, the witnesses within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by the commissioner and then

proposed by him to the witnesses; and the answers thereto were written down by the commissioner in the presence of the witnesses, who then subscribed the depositions in the presence of the commissioner.

The depositions of John W. Dunn, George H. Estes, and Joab Houghton, taken at the request of John S. Watts, attorney for claimant, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of John Gorman. The adverse party was notified, did not attend, and did not object.

AUGUSTUS DE MARLE,
Commissioner.

Commissioner's fees, $12.

IN THE UNITED STATES COURT OF CLAIMS.

JOHN GORMAN *vs.* THE UNITED STATES.

Deposition of John W. Dunn.

UNITED STATES OF AMERICA,
Territory of New Mexico, County of Santa Fé,

Be it remembered that on the 4th day of January, A. D. 1858, the following depositions were taken in accordance to the annexed agreement, to wit:

John W. Dunn, being duly sworn, states:

1st question, by John S. Watts, attorney for plaintiff. Please state your name, occupation, age, place of residence for the last year, and whether you are interested, directly or indirectly, in this claim, or in any way related to the claimant.

Answer. My name is John W. Dunn; occupation, clerk; age, 29 years; place of residence, Santa Fé; I am not interested, either directly or indirectly, in this claim, nor related to the claimant.

2d question. Please state if you were present at any conversation of Mr. Charles H. Merritt in relation to the pay of John Gorman for taking the census of Rio Arriba county; and if so, state when that conversation took place, and what it was.

Answer. About the 5th of March, 1852, in Major Cunningham's office, in Santa Fé, John Gorman asked Charles H. Merritt if he would pay him. Charles H. Merritt answered that he had no money, but that he would make it right with him; and also about the last of August or the first of September, 1852, in Major Cunningham's office, in Santa Fé, Major Cunningham asked Charles H. Merritt if he had paid John Gorman for taking the census of Rio Arriba county, in New Mexico. Charles H. Merritt answered that he had not, but that he would settle with him as soon as possible.

3d question. Do you know anything else relative to the claim in question?

Answer. I do not.

And further deponent says not.

JOHN W. DUNN.

Sworn to and subscribed before me this 4th day of January, A. D. 1858.

A. DE MARLE,
Commissioner of the Court of Claims.

Deposition of George Estes.

George H. Estes being duly sworn, deposeth and says:

1st question. Please state your name, occupation, age, place of residence for the last year; whether you are interested, directly or indirectly, in this claim, or in any way related to the claimant.

Answer. My name is George H. Estes; occupation, merchant; age, thirty-eight years; residence, Santa Fé for the past year; I am not interested, either directly or indirectly, in this claim, and I am not related to the claimant.

2d question. Please state what you know in regard to John Gorman having forwarded receipts to Joseph C. G. Kennedy, Superintendent of the Seventh Census, for the first and second payments due him for taking the census in Rio Arriba county, and do you know anything about paper marked "exhibit A?"

Answer. Paper marked "exhibit A" is a true copy of an original letter of Joseph C. G. Kennedy, and contained the two receipts mentioned in said letter, which receipts were signed by John Gorman in my presence, and enclosed in a letter to Mr. Kennedy in a letter directed to Washington city, which letter was mailed in my presence by John Gorman.

3d question. Please examine paper marked "exhibit B," and state what it is.

Answer. It is a true copy of the original letter of Joseph C. G. Kennedy, enclosing a draft to John Gorman, for the sum of $603 62, which letter I took out of the post office myself, and delivered it to John Gorman. He opened it in my presence, read the letter in my presence, and expressed great astonishment at not having received a draft for the amount of both receipts, as had been promised in a previous letter by Mr. J. C. G. Kennedy.

4th question. State whether you are acquainted with the general character of John Gorman for truth and veracity in the neighborhood in which he resides.

Answer. I am acquainted with his character; it is good. I never heard anything to the contrary.

5th question. State what conversation you had with Charles H. Merritt in regard to the pay of John Gorman for taking the census of Rio Arriba county after Merritt returned from Washington city.

Answer. Merritt and myself talking about hard times, Merritt remarked that they were very hard, that he could not even find money to pay John Gorman for taking the census of Rio Arriba county, and he still owed him. This conversation took place in the summer of 1852.

6th question. Do you know that any payment was made by Charles H. Merritt to John Gorman, and on what account?

Answer. Some small sums were paid on account of services rendered during Merritt's absence to Washington city, by John Gorman. The whole amount may be something like two hundred or two hundred and seventy-five dollars.

7th question. What have been the circumstances of Merritt since his return from Washington city up to the time he left Santa Fé?

Answer. Up to the time he left here for Old Mexico he was notoriously insolvent.

8th question. State if you know any other matter relative to the claim in question.

Answer. I have heretofore given an affidavit relating to this matter, to be used at the Census office, and as the facts were fresher in my mind it may show more clearly the true state of the case.

And further deponent says not.

GEORGE H. ESTES.

Sworn to and subscribed before me this 4th day of January, A. D. 1858.

A. DE MARLE,
Commissioner of the Court of Claims.

The further taking of these depositions is postponed to the twelfth day of January, A. D. 1858.

A. DE MARLE.

Deposition of Joab Houghton.

Joab Houghton being duly sworn, states:

1st question. Please state your name, age, place of residence for the last year, whether you are interested, directly or indirectly, in this claim, or in any way related to the claimant.

Answer. My name is Joab Houghton; occupation, attorney at law; 44 years old; residence for the past year in Santa Fé. I have no interest in the claim, and I am not related to the claimant.

2d question. Are you acquainted with the parties in this suit, and where do they reside?

Answer. John Gorman resides in Santa Fé, county of New Mexico. I know him.

3d question. Are you acquainted with Charles H. Merritt, formerly marshal of this Territory, and where does he reside?

Answer. I knew him; living in Santa Fé from 1847 to 1854, when he left for Mexico, and the last information received was that he resided in Santa Cruz de Rosales, State of Chihuahua, republic of Mexico.

4th question. Please look at paper marked exhibit C, and state what you know in regard to the credit of six hundred and forty-four dollars on it.

Answer. This credit was entered on account of judgment and execution in the United States district court within and for the county of Santa Fé, Territory of New Mexico, on account of the half of the amount justly due John Gorman as deputy marshal for taking the seventh census of Rio Arriba county, and the costs accruing on said judgment and execution, which said amount he had received in draft from the department at Washington; the remaining half justly due the said J. Gorman; the said Charles H. Merritt stated to me, over his own signature and writing, that he had not been able to pay, nor was he then able to pay, and the credit on said judgment and execution was not made for money received from me by John Gorman, but on account of his acknowledgment that he had received the amount of six hundred and three dollars and sixty-two cents from the department at Washington. I can further state that the balance of the judgment has never been paid. As one of the attorneys for Gorman, I know that upon Merritt's return from Washington, not having the money to pay Gorman for his services as deputy marshal aforesaid, he gave him his note for the amount of thirteen hundred and fifty-one dollars and seventy-eight cents, which included twelve hundred and seven dollars and twenty-four cents due him for his services as deputy marshal aforesaid, and one hundred and fifty dollars and fifty-four cents balance for personal services before that time rendered.

5th question. Please state what has been the pecuniary condition of Charles H. Merritt since his return from Washington city.

Answer. From and shortly after his return from Washington city he was known to be insolvent, and was not able to pay his deputy marshal. James M. Giddings now holds a judgment to the amount of seven hundred and more dollars against said Merritt, principally on account of services as deputy marshal as aforesaid.

6th question. Are you acquainted with John Gorman's character for truth and veracity in the neighborhood in which he resides?

Answer. I am.

7th question. Is it good or bad?

Answer. It is good.

8th question. State whether you know or not any other matter relative this claim?

Answer. I know that some time in the winter or spring of 1852 I called on Joseph C. G. Kennedy, then Commissioner of Census, at his office, to inquire in regard to the claim of John Gorman for money due him as deputy marshal for taking census in the county of Rio Arriba, Territory of New Mexico; that he called upon one of the clerks to search for any receipts of Gorman; after a short time, while I was still in waiting, the clerk reported to Mr. Kennedy that there were no receipts by John Gorman in the office. Mr. Kennedy then stated that, upon his honor as a gentleman, if Mr. John Gorman would forward him two receipts for the amount he would forward him the money by draft on New York for the whole amount, and deprecated the intervention of agent. And further deponent says not.

J. HOUGHTON.

SANTA FÉ, *January* 12, 1858.

Sworn to and subscribed before me this 12th day of January, A. D. 1858.

A. DE MARLE,
Commissioner.

Execution in Gorman vs. Merritt.

United States district court, first judicial district.

UNITED STATES OF AMERICA, }
Territory of New Mexico. }

Be it remembered, that on the 18th day of March, A. D. 1854, L. D. Sheetz, clerk of said court, issued the following execution, which runs in the words and figures following, to wit:

The President of the United States of America to the marshal of the Territory of New Mexico, greeting:

You are hereby commanded that of the goods and chattels, lands and tenements of Charles H. Merritt, in your Territory, you cause to be made the sum of $1,475 11 damages, and $10 costs of suit, which, by the judgment of our district court within and for the county of Santa Fé and Territory aforesaid, at the March term thereof, A. D. 1853, John Gorman recovered against the said Charles H. Merritt, with interest thereon from the 24th day of March, A. D. 1853, until paid, and $87 52 costs of increase, and also the costs that may accrue; and in default of sufficient goods and chattels, or lands and tenements, that you arrest the body of the said Charles H. Merritt, and in default of the payment thereof confine him in jail until released according to law. And have you the said moneys before our district court at their next June term to render account; and have you then and there this writ.

Witness the Hon. J. J. Davenport, chief justice of New Mexico, and presiding judge of the first judicial district court, and [L. S.] seal of said court, issued this 18th day of March, A. D. 1854.

L. D. SHEETZ, *Clerk.*

On the back of said execution is the following endorsements, to wit:

The plaintiff orders a credit of $644 to be entered on this execution.

H. N. SMITH,
Plaintiff's Attorney.

I hereby certify that I have served in the within case four garnishees for the plaintiff, to wit: on J. A. Cunningham, on Preston Beck, jr., on G. Wethered, Johnson & Co., and on Miguel E. Pino.

Done at Santa Fé this 27th day of March, 1854.

CHARLES BLUMNER,
United States Marshal.

I hereby certify that I have served the within execution, by reading the same to the defendant, who could not pay, and no property found.

Done at Santa Fé this 27th day of March, 1854.

CHARLES BLUMNER,
United States Marshal.

I, Augustus De Marle, clerk of said court, do hereby certify that the foregoing is a true and correct copy of said execution in the case of John Gorman *vs.* C. H. Merritt, now on record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 14th day of December, A. D. 1857.

A. DE MARLE, *Clerk.*

J. C. G. Kennedy to John Gorman.

CENSUS OFFICE, *Washington, June* 28, 1852.

SIR: Referring to my letter to you of the 16th inst., on the subject of your compensation as assistant marshal, I now herewith enclose you two receipts for first and second payments, $603 62 each.

Should Mr. Merritt not have paid over to you, on the receipt of this letter, any portion of your pay, you will please sign the receipts and return them to this office, stating the fact. Upon their coming to hand a draft will be forwarded to your address.

Under date September 3, 1851, Mr. Merritt forwarded to this office a receipt for final payment, signed by you, and it was at once passed into the treasury as a voucher, under the impression that payment had been made.

Respectfully, your obedient servant,

JOS. C. G. KENNEDY,
Superintendent.

JOHN GORMAN, Esq.,
Assistant Marshal, Santa Fé, N. M.

TERRITORY OF NEW MEXICO, *County of Santa Fé:*

I, John Henry Mink, a justice of the peace in and for this county of Santa Fé, do hereby certify that John Gorman presented to me a letter dated Census Office, Washington, June 28, 1852, signed Jos. C. G. Kennedy, superintendent, and that the within copy is a true copy of said letter.

Given under my hand, at my office, precinct No. 4 in Santa Fé, this 30th day of July, 1853.

F. H. MINK, *J. P.*

J. C. G. Kennedy to John Gorman.

CENSUS OFFICE, *Washington, February* 4, 1853.

SIR: You will receive herewith a draft for $603 62, drawn by Selden, Withers & Co., of this city, on the Bank of Commerce, New York, being amount of your final payment, which Mr. Merritt, census agent, admits, in his letter of September 1, 1852, to be due you.

You having forwarded to this office an affidavit, under date August 31, 1852, to the effect that you had not, up to that time, received any portion of your pay from Mr. Merritt, he will be forthwith called upon to report on the matter, and you shall be further advised upon the receipt of his reply.

Respectfully, &c.,

JOS. C. G. KENNEDY,
Superintendent.

JOHN GORMAN, Esq.,
Assistant Marshal, Santa Fé, N. M.

TERRITORY OF NEW MEXICO, *County of Santa Fé:*

I, John Henry Mink, a justice of the peace in and for this county of Santa Fé, do hereby certify that John Gorman presented to me a letter dated Census Office, Washington, February 4, 1853, signed Jos. C. G. Kennedy, Superintendent, and that the within copy is a true copy of said letter.

Given under my hand, at my office, in precinct No. 4 in Santa Fé, this 31st day of July, 1853.

J. H. MINK, *J. P.*

EXHIBIT B.

J. S. Watts to Secretary of the Interior.

SANTA FÉ, *September* 2, 1856.

SIR: Your letter of February 12, 1856, upon the subject of the half pay claimed by John Gorman for taking the census of Rio Arriba county, New Mexico, with a copy of the report of Mr. Kelly and all the correspondence in relation to said claim, is now before me, and, after a careful consideration of it all, I wish upon the part of Mr. Gorman to submit to you a few arguments in reply. If I were not well satisfied, in my own mind, that in truth and in fact nothing has been paid Mr. Gorman but the last half payment I would not say a word in regard to this matter, which has already occasioned the department so much trouble.

The true question in this case is this: Has the government herself or by her agent, Merritt, paid Gorman the amount due him? I think it will be found that nothing but *actual payment* will extinguish the liability of the government to Gorman for his services. A receipt without payment does not extinguish the indebtedness, nor does the fact that Gorman took Merritt's note for the amount due him from the government extinguish the liability of the government if the note was not paid by Merritt. The government cannot pay its just liabilities

with notes on faithless and insolvent agents, such as Merritt. The note of Merritt in the hands of Gorman for the amount of a debt from the government to Gorman can only be regarded as collateral security for the amount due, and if Gorman could collect it of Merritt the liability of the government was extinguished, but if Gorman could not collect the amount of Merritt the liability of the government to pay Gorman still exists; and it is due to Gorman that the amount should be paid. That the government did, in fact, pay to Gorman, 4th of February, 1853, $603 62 by draft of Selden, Withers & Co. on the Bank of Commerce, New York, is not denied, which amount was for his "last half pay." The only question, then, for present consideration is whether there is any legal evidence before the department showing that the first half pay, $603 62, has been actually paid to Gorman either by the government or its agent, Merritt. Inasmuch as the department does not contend that it paid Gorman the first half pay, but paid it to Merritt to pay to Gorman, I will now endeavor to satisfy the department that there is no legal evidence before it of payment by Merritt to Gorman; and, if successful in so doing, I think the government will take pleasure in paying to Mr. Gorman the balance due him. I do not think the affidavit of Merritt or his unsworn and contradictory statements contained in his various letters are evidence sufficiently strong to overthrow the affidavits of Gorman, Houghton, and Estes; and other circumstances in support of the statements of Merritt are admitted in evidence by the department only upon the ground that his interest is so balanced that he would probably tell the truth. For example: Merritt has received the money of the United States to pay Gorman; if he paid Gorman, his liability to the United States is discharged; if he did not pay Gorman, he is still liable to the United States for the money received by him and not paid over. I will now proceed to examine the statements of Merritt in regard to the payment by him to Gorman. But before doing so I wish to remark that on the 14th January, 1852, Merritt gave his note to Gorman at one day, with ten per cent. interest, for the sum of $1,351 78, which was before the department was apprised of Merritt's failure to pay Gorman, for Gorman's letter complaining that Merritt had not paid him was not received at the department until the 9th of March, 1852, and the money to pay Gorman had been in Merritt's hands since the 3d of May, 1851, nearly one year. Gorman, Williams, and Blumner, having all complained that Merritt had not paid them, the department requested Merritt, 29th of June, 1852, to forward a "full statement of all payments made to his assistants to date." It will be remembered that at this time Merritt had given his note to Gorman, dated 14th January, 1852, for $1,351 78, and that $1,207 24 of the consideration of that note was for amount due Gorman from the government, which had been paid to Merritt, for if a note of that amount had been given by Merritt to Gorman for any other consideration or indebtedness, Merritt would and could have explained it; and it is not pretended by any person that the consideration of said note is not as I state it; but, notwithstanding this note, Merritt writes to the department, 31st August, 1852, claiming that he had paid Gorman first half, $603 62, and had a partial arrangement to settle the "second half." Next

day, September 1, 1852, Merritt writes the department that he could not make the arrangement spoken of with Gorman, and admits "there is due him (Gorman) $603 91, being second half pay." Now, inasmuch as Merritt, in his letter of 31st August, 1852, is as silent as the tomb as to when and how he paid Gorman the $603 62, first half pay, the department naturally concluded that Merritt paid Gorman 3d of September, 1851, in cash, when Merritt sent on Gorman's receipts for the full amount due; but Merritt knew better, and really meant that he had paid him that amount with his note dated 14th January, 1852. The department, honestly thinking that Merritt had really paid Gorman in cash $603 62, did not send to Gorman the whole amount due him, as was promised by Hon. Joseph C. G. Kennedy in his letter dated June 28, 1852, but did send him second half payment, $603 62. Gorman still alleges that first half payment has not been made to him. October 30, 1854, Merritt sends his affidavit with an account, which does not show anything except that he gave Gorman his note for $1,351 78, and that in September, 1852, he had paid Gorman $603 62. Now, by reference to the letters of Merritt of August 31, 1852, September 1, 1852, and his affidavit of October 30, 1854, it will be seen that the payment alluded to is the note and not money; for the next day after swearing to this affidavit, October 31, 1854, Merritt writes to the department: "The credit appears on the execution in 1854." I now ask how it was paid in 1852? The answer is evident. It was paid in January, 1852, by note. On the 31st of March, 1855, Merritt again alleges payment and refers to his letter of latter part of 1854, which means his letter of 31st October, 1854, in which he claims the payment to have been made in 1852, which brings us back again to payment by the note of January, 1852. After all these shiftings, turnings, dodgings, and efforts to shield himself by alleging payment in his letter of 29th September, 1855, he concludes to make a clean breast of it and come out with the honest truth, and in that letter he says in substance, I paid Gorman with my note; he sued me, but has been unable to collect anything from me, and the note was not taken by him in satisfaction of the indebtedness of the United States.

As appears by the papers now before me, suit was brought by Gorman against Merritt 12th of June, 1852, but the judgment was not rendered until March, 1853, for $1,475 14. Now, it will be seen that the draft for $603 62, sent to Gorman by letter dated February 4, 1853, did not arrive at Santa Fé until the 27th of March, 1853, which was a few days after the judgment was rendered against Merritt. How did Gorman then find himself? He found himself with a judgment against Merritt for the whole amount due him from the United States, and also with a draft for one-half the amount, $603 62, sent to him by the department. Might not Merritt then say to Gorman, the government has paid you $603 62, for which you have a judgment against me; now, credit the $603 62 on that judgment? This Mr. Gorman, as an honest man, could not and did not refuse to do; but credited the amount in the judgment, which explains fully how the credit of $644 was made. If there was any doubt on this point, it is removed by the letter of Mr. Merritt, explaining the error that Mr.

Whiting had fallen into, for Merritt says in his letter of September 29, 1855: "The Secretary is laboring under a misapprehension of the facts. The $603 62 were, it is true, included in the note given by me to Gorman, but after suit were withdrawn, by his order, from the amount of the judgment." In the same letter he says that he has never been able to pay John Gorman "any part of the amount due him." This declaration was made by Merritt long after the $644 was credited on the judgment, and at as late a date as September 29, 1855, when the credit was entered on the judgment, 27th of March, 1854. Gorman had long before received the last half pay. Now, if Merritt had paid Gorman in March, 1854, $644 in cash, is it to be believed that on September 29, 1855, he would write to the department that he had not been able to pay Gorman anything? The question, however, as to the payment of the $644 is fully explained by the affidavit of Judge Houghton, which was sent to the department some months past, and since the report of Mr. Kelly was made on this subject. I acknowledge the correctness of the position assumed by Mr. Whiting in his letter of 30th May, 1855. If C. Merritt had actually paid Gorman $644 on the judgment, that amount should have been passed to the credit of the United States as a preferred creditor; but I have already proved by the statements of Merritt, the affidavit of Houghton and Strong, corroborating circumstances, that no such payment was in fact made, and of course the reasoning of Mr. Whiting, however logical, must fail when the facts upon which it is based are proved to be unfounded. The question then presents itself in this attitude: September 29, 1855, Merritt admitted Gorman had not been paid, and the other evidence before the department also shows that Merritt had not paid Gorman anything. Now, what evidence has the department since September 29, 1855, to show payment to Gorman? There is no evidence whatever to show payment to him, and the department is compelled to fall back on the old receipts of Gorman, said to have been given by him to Merritt, September 3, 1851, for all that was due him. The department now says, we paid your money to Merritt, in May, 1851. September, 1851, you sent us your receipt for the whole amount, and if you did not get the money of Merritt, it is not our fault, and you must go without it. I will now proceed to controvert the accuracy of that position. 1st. The department itself has heretofore repudiated that view of the case, for long after the department had Gorman's receipts for *all* the pay due him, upon Merritt's admission that the last half had not been paid to Gorman, the department sent it to him. Why did not the department say then as the department now says: We have your receipts for all the money due you, and unless you show the receipts are forgeries, we will not pay you a cent? The department did not do so, but fully recognized the law to be that if Gorman had not been paid, it was the duty of the government to pay him, no matter whether the government had his receipts or not. The department not having protected itself behind one of the receipts of 3d September, 1851, after Merritt's statement that the last half had not been paid, should be ashamed now to attempt to protect itself behind the other receipt of September 3, 1851, when Merritt admits and there is abundant evidence to prove

that Merritt never did pay Gorman any part of the amount due him for his services in taking the census of Rio Arriba county. The government should either sue Gorman and get back the $603 62 paid, as having been wrongfully paid him, or should pay the remaining balance yet due him. If a receipt procured for the last half payment (without a payment in fact having been made) does not discharge the indebtedness of the United States, how can a receipt for the first half payment so discharge said indebtedness? Having, as I think, shown that the duty of the government to pay Gorman is entirely independent of the forgery or genuineness of the receipts of September 3, 1851, I will now endeavor to show that the evidence before the department "shows clearly that the said receipts are forgeries." Gorman denies said receipts under oath; or, as a lawyer would say, pleads "*non est factum*" under oath. This plea puts upon the government the burden of proof; and before the government can claim protection behind the receipt, the government must prove that the signature to the receipt is in the handwriting of John Gorman; and before the witness can do that he must be sworn, and state that he is acquainted with the handwriting of John Gorman, and that the signature to that receipt is in his handwriting. Is any such evidence as that before the department? Nothing of the kind is proved; Mr. Kelly, who has never seen Mr. Gorman write, takes his signature to his affidavit, looks at it, examines it carefully, ponders and meditates over each letter, places one signature over the other, and thus, from mere comparison of handwriting, comes to the conclusion that Gorman has sworn falsely, and that the receipts were signed by him. Such proof does not fulfil the requirements of the law. It has been well settled by legal adjudications that mere comparison of handwriting is not sufficient proof to establish the execution of an instrument denied under oath. The suggestion that strength is given to the genuineness of the receipts from the fact that authenticated copies of said receipts were sent to the United States district attorney, and no action is known to have been had in relation to them, is not entitled to any weight; the only object to be effected by sending copies of the receipts was to indict Merritt for forgery; and to do that the original receipts should have been sent, so that Gorman could state to the jury, I did not sign that receipt; but how could he state by looking at a copy that he did not sign the original? The district attorney might as well have asked and the department sent a blank sheet of paper as to have sent copies of the receipts. No wonder "no action is known to have been had in relation to them." I will now proceed to notice the only remaining point alluded to by Mr. Kelly: he says "that Gorman did accept the note given him by Merritt in lieu of money, and that he gave the receipt to Merritt for the first half payment in return for what he at the time regarded as a valuable consideration, and so released the United States." Now, Mr. Merritt, in his letter of September 29, 1855, which may be regarded as his dying declarations in regard to this matter, says: "The $603 62 were, it is true, included in the note given by me to Gorman, but after suit were withdrawn by his order from the amount of the judgment. No part of the balance of the judgment has ever been satisfied by me, nor have I ever been able to pay John Gorman any part of the amount due. The

other obligation I gave him for $603 62, which I understood has been forwarded to Hamilton Tout, esq., was given and intended as evidence of my indebtedness to Gorman, and that I had not been able to pay him, and was thus conditionally received by Gorman, and not in satisfaction of the claim." Here Merritt says expressly that Gorman did not release the United States when he took his note. The position taken that the government can pay its debts in the notes of its faithless and insolvent agents might be very convenient for the government, but very unjust to its debtors. The conduct of Gorman in taking the note, suing on it, and having execution issued, was creditable and praiseworthy. He found a faithless agent of the government squandering funds put in his hands to pay him; he used every diligence in his power to get his money from Merritt, in order that the government might not lose it, and that, too, at his own expense; now the government says to him, because you were fool enough to try and get the money from Merritt government will not pay you; you must lose it. Having now travelled over all the material points in the case, I shall insist that the following points have been established:

1st. That nothing but payment will extinguish the liability of the United States to Gorman.

2d. That Gorman has not in fact received but half his pay.

3d. That the receipt of Gorman, if genuine, does not deprive him of his right to the balance due if no payment has in fact been made, and that the department having applied rule to the second half pay, should also apply the same rule to the first half pay.

4th. That there is no sufficient evidence before the department of the genuineness of the receipts of September 3, 1851.

If these positions be true, the inference is irresistible that the government should forward to Mr. Gorman a draft to my care for $603 62 yet unpaid, with directions to deliver it to Gorman upon his transferring to the United States $603 62 of the amount of the judgment Gorman has against Merritt or his securities. It is more equitable and just that the government should pay the amount twice than that Gorman, who rendered the services, should lose it.

Yours, respectfully,

JOHN P. WATTS,

Attorney for John Gorman.

EXHIBIT A.

REPORT OF MOSES KELLY.

Report upon the claim of John Gorman, assistant marshal for taking the seventh census in New Mexico.

DEPARTMENT OF THE INTERIOR, *February* 11, 1856.

My attention has been lately called to the case of John Gorman, who claims that he has never been paid a certain sum due him for services rendered as assistant marshal for taking the census of a portion of New Mexico.

As this case has undergone repeated examinations by the department, and been the subject of several reports and no little correspondence, the papers relating to it have become quite numerous, and rendered it somewhat difficult to arrive at a satisfactory conclusion respecting it.

In considering it, therefore, at the present time, it is proposed to take it up from the commencement, and treat it as if it were now, for the first time, before the department.

Mr. Gorman, it appears, was employed by the marshal of New Mexico, (C. H. Merritt,) under the act of 23d May, 1850, to take the census of Rio Ariba county, New Mexico, and was entitled by said act to receive therefor $603 62.

His account was made out accordingly by the Census office, and duly certified for payment on the 18th April, 1851.

Mr. Merritt, (the marshal,) being then in Washington, the account was placed in his hands, with money to pay it, and with directions to turn over the same to Mr. Gorman, obtain his receipt therefor, and return it to the Census office.—(See copy 1, annexed.)

Mr. Gorman's compensation was increased 100 per cent. under the act of 30th August, 1850, by which he was entitled to an additional allowance of $603 62. These two sums were treated as separate and distinct payments, and distinguished, the former as "the first half payment," and the latter as the "second and last payment." Gorman's account for "the second and last payment" was made up, and certified by the Census office, on the 3d May, 1851, and the money placed in Merritt's hands to pay it, as was done with reference to the first half, and with similar instructions.—(See copy 2, annexed.)

On the 3d September, 1851, *Merritt enclosed to the Census office from Santa Fé, New Mexico*, both of these accounts, with Gorman's signature to each of them. *That for "the first half payment" was receipted in full*, and was a complete and perfect voucher in favor of the disbursing agent; that for "the second and last payment" *was receipted in blank*, but as the money to pay it had been sent out through Merritt, and as Gorman was presumed not to have affixed his signature to it without being paid, the blank was filled up in the Census office with the amount named in the body of the account, and credit given the disbursing agent accordingly.—(See copies 3 and 4, annexed.)

After having carefully compared the signatures to these receipts with the signature of Gorman to an affidavit made by him on the 21st October, 1854, duly authenticated under seal of court, I have no hesitation in expressing the conviction that they are genuine, although Mr. Gorman appears to have forgotten that he ever gave any other receipts than those which he himself subsequently sent directly to the Superintendent of the Census.

If these receipts are genuine, it is respectfully submitted that, in giving them, Gorman released the United States from all indebtedness on that account. The department had sent him the money through Merritt, and he had acknowledged the receipt of it. The case was closed.

The case was afterwards reopened as follows: Gorman wrote to the Census office that he had not been paid; to which the Superintendent

replied that the money had been sent him as hereinbefore stated, and that the office held his receipts for it and regarded his account as "*balanced and closed*;" but that, notwithstanding all this, if he could establish the fact of his not having actually been paid by Merritt, his account would be reopened and paid by the department.—(See copies 5, 6, 7, and 8, annexed.)

At the same time Merritt was notified of the allegations made by Gorman and called upon for an explanation as to their meaning.—(See copies 9, 10, 11, and 12, hereto appended.)

He responded on the 31st August and 1st September, 1852, and admitted that he had only paid "the first half payment," whereupon the remaining half was sent to Gorman by the Census office, under date of 4th February, 1853, and the fact reported to your predecessor four days thereafter.—(See copies 13, 14, 15, and 16.)

Gorman acknowledged the receipt of said remittance by letter dated 27th March, 1853; renewed his allegation that he had not been paid "the first half payment" by Merritt, and complained that it had not been sent him by the department.—(See copy 17, annexed.)

Merritt, on the other hand, constantly averred that "the *first* half payment" had been made; in view of which, and because the claim to the contrary only rested upon the mere statement of the claimant, further action in the premises was suspended until the 30th May last, when the whole case was reviewed by the department, and a decision made that Gorman's claim against the United States must be considered as closed. That decision was made by Mr. Whiting, as Acting Secretary, and from it Gorman now appeals to you. In support of his claim he has sent on additional papers, and it is now thus supported:

1st. By the affidavit of J. Houghton, dated 21st October, 1854, that the Superintendent of the Census had informed him in person, on the 3d August, 1852, "that no receipts had been filed against said Gorman, nor did it appear from the records of the office that any money had been paid to him in compensation of services, though the whole amount due said Gorman had been entrusted to the hands of Charles H. Merritt for the purpose of paying his deputies, said Merritt being marshal for the district of New Mexico; but said Merritt having failed to pay said Deputy Marshal Gorman, the Secretary of the Interior had decided to pay directly from the Census department the whole amount due, which was conceded to be twelve hundred and seven dollars and twenty-four cents; and said Superintendent further states that upon the receipt of duplicate receipts from said Gorman he would forward to him a draft for said amount of twelve hundred and seven dollars and twenty-four cents."

2d. By the affidavit of George H. Estes, of same date, that Gorman "did receive, in the month of August, A. D. 1852, one receipt, for his first half-pay, for six hundred and three dollars and sixty-two cents; and also, at the same time, one for a similar amount for his final pay; and that, accompanying the said receipts, he received a letter from J. C. G. Kennedy, Superintendent of the Seventh Census, at Washington City, stating that inasmuch as Charles H. Merritt, United States marshal, had not paid him, he should sign the receipts and forward them to his office, and that he would send him a draft for

the money, and the government would look to the said Merritt and his securities for the reimbursement of the money; and that the said Gorman did, in compliance with the request of said letter, in my presence sign the two said receipts, and mailed them in the post office here, sealed in a good envelope and directed to said Kennedy, superintendent as aforesaid."

3d. By his own affidavit, of same date, "that he has never received from Charles H. Merritt, United States marshal, any pay or sum of money whatever for his services as deputy or assistant marshal as aforesaid, nor has he signed any receipts except those referred to in the accompanying affidavits of George H. Estes, nor has he ever authorized or appointed any person to receive pay for him as assistant marshal as aforesaid."

4th. By the admission of Merritt himself, under date of 29th September last, that he had not, in fact, paid Gorman "the first half payment" in money, but that the amount of it had been included in a certain note given by him to Gorman in the settlement of an open account between them, and that no part of said note had been paid.—(See copies 18, 19, 20, and 21, annexed.)

As respects the first affidavit, it is quite evident Judge Houghton misapprehended the intentions of the Superintendent of the Census, for the records abundantly show that the promised remittance was not to depend upon the mere return of receipts by Gorman, but upon his showing that the money had not already been paid him. Such evidence was furnished as to the *last* half payment only, and consequently only that portion was remitted.

Another material error appears in this affidavit, as follows: The Superintendent of the Census *had written three times* to Mr. Gorman, (on the 9th March and 16th and 28th June, 1852,) informing him that his receipts for both payments were here, and in one letter saying that his account "*was balanced and closed*" upon those receipts.—(See copies 5, 6, and 8.) I cannot conceive, therefore, how he could have told Mr. Houghton on the 3d *August*, 1852, "that no receipts had been filed against said Gorman," with the record of these letters before him. Mr. Houghton must, then, have misunderstood him upon this point also.

The second affidavit is only important as explanatory of the third, *which* (third affidavit) *cannot be true unless the signatures to the receipts forwarded by Merritt in September*, 1851, *are forgeries*. Those signatures, however, upon careful comparison with that appended to this very affidavit, appear to be genuine, and the belief that they are so is strengthened by the fact that although in September, 1852, authenticated copies of the receipts were sent to the district attorney of New Mexico, at his request and for the use of the grand jury, no action is known to have been had in relation to them.—(See copies 22 and 23, herewith.)

And finally, the admission of Merritt, upon which so much stress is laid by Gorman, and which he endorses by using it, instead of strengthening the claim, *proves too much*, for it establishes the fact that Gorman did accept the note given him by Merritt in lieu of money, and that he gave the receipt to Merritt "for the first half payment."

in return for what he at the time regarded as a valuable consideration, and so released the United States.

Subsequently he appears to have distrusted Merritt, and looked to the department here for payment.

But, even while doing this, he continued to hold Merritt to his own personal responsibility in the matter, and brought suit against him *for the full amount of the note, and obtained judgment against him therefor* in the United States district court for the first judicial district of New Mexico, at the March term of said court.

The note given by Merritt was for $1,351 78, and judgment was rendered for the entire principal, with interest and costs of suit, amounting in all to $1,575 14.

It further appears that "execution was issued on said judgment for said amount; and afterwards, at the June term, 1854, of said court, the marshal returned said execution with the following indorsement, to wit: 'The plaintiff orders a credit of six hundred and forty-four dollars to be entered on this execution.

"'H. N. SMITH, *Plaintiff's Attorney.*'

"I hereby certify that I have served in the within case four garnishees for the plaintiffs, to wit: On F. A. Cunningham, on Preston Beck, jr., on J. Wethered, Johnson & Co., and on Miguel E. Pino.

"Done at Santa Fé this 27th day of March, 1854.

"CHARLES BLUMNER, *U. S. Marshal.*"

(See copy 24, annexed.)

In view of these facts the Acting Secretary of the Interior, on the 30th May last, decided as follows:

"The department is of the opinion that the indebtedness of the United States has been merged by Gorman into that of Merritt, and regards the payment of $644 on the judgment as made on behalf of the United States as a preferred creditor. The present claim is therefore rejected."—(See copy 25.)

Gorman meets this objection to the claim with the following statement from Merritt, dated 29th September last:

"In that letter (that of May 30, 1855,) the Secretary is laboring under misapprehension of the facts. The $603 62 were, it is true, included in the note given by me to Gorman, but, after suit, were withdrawn by his order from the amount of the judgment. No part of the balance of that judgment has ever been satisfied by me, nor have I ever been able to pay John Gorman any part of the amount due him."

In other words, the credit was not endorsed upon the judgment in consequence of any payment having been made to Gorman by Merritt, but by withdrawing from the judgment so much of the note as included "the first half payment."

The effect of this, if sanctioned by the department, would be to substitute the United States for Merritt to that extent, and so allow Gorman to look to the former instead of the latter for payment. This would doubtless be a very good arrangement for Mr. Gorman, since

the prospect of collecting the money from Merritt is now so unpromising; but inasmuch as, instead of demanding and receiving the money before giving his receipt, he seems himself to have constituted Merritt his banker, and to have preferred the mode of settlement offered him by Merritt, who makes oath, under date of October 30, 1854, "that on his arrival here (in Santa Fé) in the month of July, 1852, [1851 must, it is presumed, be intended, as the census clerk states that Merritt has not been here *since May*, 1851,] he proferred to said Gorman the said sum of six hundred and three dollars and sixty-two cents, his compensation for taking the census in the county of Ariba, as assistant marshal as aforesaid, and that the said Gorman requested him, the said Merritt, to retain the said money on deposit, as he had other moneys on deposit belonging to him, the said Gorman," (see copy 24, annexed,) it is respectfully submitted whether the department has any authority to assent to it.

If not, the decision heretofore made, it seems to me, must be regarded as final and conclusive, unless it can be clearly shown that the signatures to the receipts furnished by Merritt in September, 1851, are forgeries. A copy of that decision is hereto appended, marked No. 25.

All which is respectfully submitted.

MOSES KELLY, *Disbursing Clerk.*

Hon. R. M. McCLELLAND,
Secretary of the Interior.

No. 1.

CENSUS OFFICE, WASHINGTON, *April* 18, 1851.

SIR: The following payments are this day made to you for account of assistant marshals, viz:

To John R. Tullis, in full for his account as rendered, and upon your holding his power.....		$2,002 12
To James M. Giddings, same as above.....		894 91
		2,897 03
Also the first half payments for the following assistants, whose receipt for the same, signed by them respectively, you will obtain and mail to this office.		
John Gorman, Rio Ariba county.....	$603 62	
Charles Williams, Taos county.....	601 26	
James O. Robinson, San Miguel county.....	331 47	
Charles Blumner, Santa Fé county.....	297 42	
		1,833 77
Aggregate amount.....		4,730 80

The blank receipt for second payments to the four assistants above named, and which you will receive herewith, you will please have signed without filling up the amount, and mail to this office, and the amounts found to be due to them respectively will be forwarded to them through your care.

Your personal receipt for the amount of the first half pay, made those assistants, will be held until the receipts therefor signed by the assistants themselves reach here, when it will be sent to you or destroyed at your option.

Respectfully, &c., &c.,

J. C. G. KENNEDY.

C. H. MERRITT, Esq.,
U. S. Marshal, Territory of New Mexico, Washington, D. C.

No 2.

CENSUS OFFICE, WASHINGTON, *May* 3, 1851.

SIR: You will pay to the following assistant marshals the amounts specified in full for their services, respectively, and transmit their receipts to this office, the sum of eighteen hundred and thirty-three dollars and seventy-seven cents having been turned over to you for the special purpose this day.

John Gorman, Rio Ariba county	$603 62
Charles Williams, Taos county	601 26
J. O. Robinson, San Miguel county	331 47
Charles Blumner, Santa Fé county	297 42
	1,833 77

I am, sir, respectfully, yours,

J. C. G. KENNEDY,
Superintendent Seventh Census.

C. H. MERRITT, Esq.,
Marshal and Disbursing Agent Territory of New Mexico.

No. 3.

CENSUS OFFICE, DEPARTMENT OF THE INTERIOR,
April 18, 1851.

SIR: Mr. John Gorman, the assistant for the subdivision of Rio Ariba county, district of New Mexico, having made his returns to the marshal of said district, and the same having been received at this office, with the proper certificate of said marshal thereto annexed, and it appearing that the said John Gorman is ultimately entitled to receive twelve hundred and seven dollars and twenty-four cents, should his returns, on examination, be found conformable to the act of May

23, 1850. You will pay to the assistant six hundred and three dollars and sixty-two cents, (being the one-half of said full amount,) according to the 21st section of the act aforesaid, the same having been approved by the Secretary of the Interior.

J. C. G. KENNEDY,
Superintendent Seventh Census.

R. H. WILLIAMSON, Esq.,
Disbursing Agent of Census Fund.

$603 62. Draw check to order of C. H. Merritt.

ARIBA COUNTY, *District of New Mexico.*

Received of R. H. Williamson, esq., disbursing agent of the seventh census fund, six hundred and three dollars and sixty-two cents, being the first half payment of the amount due me as assistant marshal.

JOHN GORMAN,
Assistant Marshal.

$603 62. Have this signed.

No. 4.

District of New Mexico, subdivision of Rio Ariba County.

CENSUS OFFICE, DEPARTMENT OF THE INTERIOR,
May 9, 1851.

The returns of John Gorman, the assistant for the subdivision of Rio Ariba county, district of New Mexico, having been received at this office, carefully examined and found to have been executed in a satisfactory manner, he is entitled to receive additional, under 21st section of the act of 23d May, 1850, six hundred and three $\frac{62}{100}$ dollars, it being the second and last payment to him under the said act.

You will therefore pay the amount to the said assistant.

$603 $\frac{62}{100}$.

JOS. C. G. KENNEDY,
Superintendent Seventh Census.

R. H. WILLIAMSON, Esq.,
Disbursing Agent, Census Fund.

District of 185 .

Received of disbursing agent of the seventh census, dollars, it being, with the amount heretofore received, full payment for services rendered as assistant marshal under the act of 23d May, 1850.

JOHN GORMAN,
Assistant Marshal.

No. 5.

CENSUS OFFICE, WASHINGTON, *March* 9, 1852.

SIR: I have just received your letter of the 31st January, having relation to your compensation for services as assistant marshal in taking the census of New Mexico, and in reply would inform you that when Mr. Merritt was here in April last funds were placed in his hands *to pay all his assistants;* and as he returned to this office, under date September 3d, your receipt (signed by you) for final payment, it was presumed that he had paid you in full. I regret very much to learn that this had not been done, and will at once write to the agent, Mr. Merritt, in relation to the matter. You will see that no blame attaches to this office, and that to its action the delay is not attributable. The money was placed in the hands of Mr. Merritt, to facilitate the settlement of the claims of his assistants, and those whom he has paid received their money much earlier than they could have done had it been sent by mail, and the dangers, as well as the delays of mail-carriage to New Mexico, were in this way avoided.

The whole amount of your claim as rendered and paid is $1,207 $\frac{14}{100}$. Your account is balanced and closed.

Very respectfully, your obedient servant,

JOS. C. G. KENNEDY,
Superintendent Seventh Census.

JOHN GORMAN, Esq.,
Assistant Marshal, Santa Fé, New Mexico.

No. 6.

CENSUS OFFICE,
Washington, June 16, 1852.

SIR: Your letter of the 1st May was received this morning. In my letter of the 9th March I informed you that Mr. Merritt, when here in April, 1851, was appointed assisting disbursing agent, to pay his assistants; that sufficient funds had been placed in his hands to liquidate all their claims; that he returned your receipt for second payment, under date September 3, 1851; and that your account was balanced and closed. I have now, therefore, only to state that your request that the department will send you the amount of your compensation cannot be complied with at this time; you will, however, eventually receive your pay. The department will investigate the matter with the least possible delay, and communicate further with you upon the subject.

Very respectfully, your obedient servant,

JOS. C. G. KENNEDY,
Superintendent Seventh Census.

JOHN GORMAN,
Santa Fé, New Mexico.

No. 7.

CENSUS OFFICE,
Washington, June 25, 1852.

SIR: I have the honor to acknowledge the receipt of your communication of yesterday, having relation to the compensation of John Gorman, esq., who acted as assistant marshal in taking the census of New Mexico, and in reply would inform you that when here in May, 1851, Mr. C. H. Merritt, census agent for New Mexico, was appointed assistant disbursing agent to pay the accounts of his aids, and funds sufficient to pay all were placed in his hands. This course was adopted to facilitate payment of the claims and to avoid the dangers and delay of mail carriage. The department presumed, until informed to the contrary by Mr. Gorman, under date January 31, 1852, that Mr. Merritt had paid all his assistants. Mr. Gorman's letter was received on the 9th March, and the same day he was informed that the sum of $1,207 24, the amount of his compensation, had been placed in the hands of Mr. Merritt, who was authorized and instructed to settle the claim. Under date May 1, Mr. Gorman acknowledged the receipt of my letter, and complained that Mr. Merritt had never paid him any portion of his compensation; but that he (Merritt) admitted that the full amount had been placed in his hands by the department. This letter was received on the 16th June instant, and in answer thereto Mr. Gorman was informed that the department could not *now* pay him, but that he would eventually receive his compensation. To effect this immediate arrangements will be made. Mr. Merritt has been written to in relation to the delinquency, and urged to discharge, according to his instructions, the claims of his assistants. He has failed to do so, and this office will see the demands of all legal claimants settled immediately.

I am, sir, very respectfully, your obedient servant,

JOS. C. G. KENNEDY,
Superintendent Seventh Census.

Hon. JOHN G. MILLER,
House of Representatives.

No. 8.

CENSUS OFFICE,
Washington, June 28, 1852.

SIR: Referring to my letter to you of the 16th instant, on the subject of your compensation as assistant marshal, I now herewith enclose you two receipts for first and second payments, $603 62 each.

Should Mr. Merritt not have paid over to you on the receipt of this letter any portion of your pay, you will please sign the receipts and return them to this office, stating the fact. Upon their coming to hand, a draft will be forwarded to your address.

Under date 3d September, 1851, Mr. Merritt forwarded to this office a receipt for *final* payment, signed by you, and it was at once passed into the Treasury as a voucher, under the impression that payment had been made.

Respectfully, your obedient servant,

JOS. C. G. KENNEDY,
Superintendent.

JOHN GORMAN, Esq.,
Assistant Marshal, Santa Fé, New Mexico.

No. 9.

CENSUS OFFICE,
Washington, March 9, 1852.

SIR: Enclosed herewith is a copy of a letter from Mr. John Gorman, your assistant, received this day.

Mr. Gorman complains to the department that you have paid him no portion of the amount—$1,207 24—placed in your hands in April last to pay him for his services as assistant marshal.

I have informed him of the action taken by the department, and trust that you will discharge the claim without further delay, or make satisfactory explanation.

Very respectfully, your obedient servant,

JOS. C. G. KENNEDY.

CHAS. H. MERRITT,
U. S. Census Agent, Santa Fé, New Mexico.

No. 10.

CENSUS OFFICE, WASHINGTON, *April* 8, 1852.

SIR: I have just received a letter from Charles Blumner, (a copy of which I send you herewith,) who complains that you have not paid over to him the second and final portion of his compensation for services as assistant marshal in taking the census of the county of Santa Fé, in your district.

Under date of September 3, 1851, you sent to this office Mr. Blumner's receipt for the second half of his compensation, and it was presumed by the department that you had paid him the amount. His account is balanced and closed.

You will give the matter your immediate attention, and satisfy the claim of Mr. Blumner, if it be not already paid. I would be glad to hear from you in relation to this, and the case of John Gorman, about which I wrote you March 9, 1852.

Very respectfully, your obedient servant,

J. C. G. KENNEDY,
Superintendent Seventh Census.

CHARLES H. MERRITT, Esq.,
Census Agent, Santa Fé, New Mexico.

No. 11.

CENSUS OFFICE, WASHINGTON, *May* 5, 1852.

SIR: I am in receipt of a letter from your assistant, Charles Williams, (a copy of which is herewith enclosed,) informing the department that he has never received from you the second half of his compensation. Letters of the same import have been received from John Gorman and Charles Blumner, copies of which have been sent to you.

I would again direct your attention to this matter, and trust that the claims of your assistants will be paid without further delay. Please let me hear from you on the subject.

Very respectfully, your obedient servant,

J. C. G. KENNEDY.

CHARLES H. MERRITT, Esq.,
Census Agent, Santa Fé, New Mexico.

No. 12.

CENSUS OFFICE, WASHINGTON, *June* 29, 1852.

SIR: I am in receipt of yours of the 31st of April, in reply to a letter from this office of the 9th of March last, in reference to payments to your assistants.

You will please, on *receipt hereof*, to forward a full statement of all payments made to your assistants to date, inasmuch as I have this day addressed Messrs Gorman, *Williams*, and *Blumner*, on the subject of their claims, enclosing to the first mentioned, for signature, first and second receipts, to Mr. Williams a final receipt, and to Mr. Blumner one for the first half, promising on their return to forward drafts for the same, if the money should not have been paid over by you.

In yours of the 30th of April you allege that Gorman has received *one* half. Be explicit on this point.

Your particular attention is also called to the letter from this office of the 30th of December, 1851, directing the return of the amount placed in your hands for the payment of assistant marshal J. D. Robinson.

Respectfully, your obedient servant,

JOS. C. G. KENNEDY.

P. S.—I will be much censured for not prosecuting to collection the claim for the balance unpaid of the advance made you for the payment of the assistants.

I wish to refrain doing so, on account of the *severe* penalties attached under the law of Congress respecting default in disbursers.

Why can you not give security for the payment, say, in a twelvemonth, by your father and yourself entering into a bond.

If this is not done it will be necessary to secure it through the

United States attorney. This latter course would make the matter notorious, and require perhaps the infliction of penalty.

I make these suggestions for your benefit.

Truly,

J. C. G. K.

C. H. MERRITT,
Marshal, Santa Fé, New Mexico.

No. 13.

SANTA FÉ, *August* 31, 1852.

SIR: Yours of the 28th June came to hand by last monthly mail, and I hasten to answer it. I have paid my assistants as follows:

To John R. Tulles, in full	$2,002 00
James M. Giddings, in full	894 91
James D. Robinson, in full	662 94
John Gorman, 1st half*	603 62
Charles Williams, 1st half	601 26
Charles Blumner, 1st half	297 42
	5,062 15

Mr. John Gorman is not here; when I last met him I had made a partial arrangement to settle the second half, and have written to him this day in relation to it; you will please not do anything with his second half payment until you hear from me, which will be by next mail. If I settle with Mr. G. then I will owe the office $898 68, if not, I will owe $1,502 30. You suggest that I had better give security for the amount; this I will most certainly do, and it will not be necessary to send to my father for security, as I have explained the whole matter to my friends here and can give the security here if the amount was ten times as large. After you ascertain the amount to be returned, draw a bond payable to the United States, on or before the 1st September, 1853, and send it to me, and I will return it with *certified good security*; this will be best, as a suit could not be begun against me before the next June term of the United States court, as the next term will come off in November, (1st Monday.) I send you the documents in relation to the manner Robinson was paid, and had Mr. Robinson been disposed to act in the right manner there would have been no difficulty. I have consulted counsel, and they tell me that if I pay the money back to the government Lieutenant Thomas cannot be made to pay the money I paid him back to me, as I am bound on the acceptance enclosed; Lieutenant Thomas, by his agent, has made me a tender of $38 and the enclosed acceptance in payment of

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* An affidavit received at Census office, dated 31st August, 1852, in letter of same date from Assistant Marshal John Gorman, at *Santa Fé*, in which he states he has not, up to that time, received any portion of his pay.

the $700 draft, which I have declined to receive until I hear from you. Now, Robinson will never apply to the Census office for his pay unless he is worse than I think him; and it would be a great relief to me to be released from further care of the matter. That I paid the money in Washington, in the full belief that it would be agreeable to Mr. Robinson, the enclosed draft will show; Lieutenant Thomas is now in Washington and he will explain the whole matter to your satisfaction, as he will recollect that I gave him the money in Washington on the acceptance. I hope this will be satisfactory. I will write next mail in relation of Gorman's business, after which you can, if you wish, send me the bond as aforesaid. I will give J. L. Collins, esq., and Captain St. Vrain as security, and have their ability certified by one of the United States judges.

I am, sir, with the highest respect, your obedient servant,

C. H. MERRITT.

Hon. J. C. G. KENNEDY.

P. S.—I hardly know how to express my thanks to you for the suggestion in the P. S. to your letter, as by the manner spoken of all notoriety can be avoided, and please accept my thanks for it, as this is the only time in my life that I ever allowed myself to be in such a position and I assure you it shall be the last. I would rather my father would know nothing about this business, but if you request it he will go the security, or pay the money, without a moment's hesitation.

Very truly, your friend and obedient servant,

C. H. MERRITT.

No. 14.

SANTA FÉ, *September* 1, 1852.

SIR: In my letter of yesterday I spoke of being able to arrange with Mr. Gorman his second half-pay, since then I have seen Mr. G., and find that I cannot make the arrangement spoken of, so that there is $603 91, being the second half-pay, due Mr. Gorman. Send the bond for the whole amount and it shall be forwarded with good certified security. If the assistants here would take my obligation, with security, the matter could be arranged here, but they have refused to do it since they received your last letter.

Very respectfully, your obedient servant,

C. H. MERRITT.

JOS. C. G. KENNEDY,
Superintendent Seventh Census, Washington.

No. 15.

CENSUS OFFICE,
Washington, February 4, 1853.

SIR: You will receive herewith a draft for $603 62, drawn by Selden, Withers & Co., of this city, on the Bank of Commerce, New York, being the amount of your final payment; and which Mr. Merritt, census agent, admits in his letter of September 1, 1852, to be due you.

You having forwarded to this office an affidavit under date of August, 31, 1852, to the effect that you had not, up to that time, received any portion of your pay from Mr. Merritt, he will be forthwith called upon to report on the matter; and you shall be further advised upon the receipt of his reply.

Respectfully, &c.,

JOS. C. G. KENNEDY.
Superintendent.

JOHN GORMAN, Esq.,
Assistant Marshal, Santa Fé, New Mexico.

No. 16.

CENSUS OFFICE, *February* 8, 1853.

SIR: In obedience to the directions contained in your letters of the 14th and 29th ultimo, I have caused the several amounts due as final payments to Assistant Marshals John Gorman, Charles Blumner, and Charles Williams, to be paid by drafts, mailed on the 4th instant, the census agent, C. H. Merritt, having failed to pay over to those officers the money placed in his hands for that purpose on the 3d of May, 1851.

The several sums alluded to amount in the aggregate to $1,502 30. You will perceive from the accompanying letters from Mr. Merritt of August 31, and September 1, 1852, that he acknowledges his indebtedness to the government in this sum, and states, that if a bond be drawn and sent to him, payable to the United States on or before the 1st of September, 1853, he will return it with certified good security.

I would, therefore, respectfully suggest that you take such action in the premises as in your judgment the interest of the government may call for.

I would further remark, that it is alleged, in an affidavit received from Assistant Marshal *Gorman*, dated August 31, 1852, that he had, up to that time, received *no portion* of his pay from the census agent; but as Mr. Merritt contends that the *first* half ($603 62) *has been paid* the said assistant marshal, this matter is held in suspense, and it has not been deemed advisable to include the amount of this payment in the bond about being drawn to cover his indebtedness.

With great respect, your obedient servant,

J. C. G. KENNEDY,
Superintendent.

Hon. ALEX. H. H. STUART,
Secretary of the Interior.

No. 17.

SANTA FÉ, *New Mexico*, *March* 27, 1853.

SIR: Your letter of the 4th of February, 1853, has come to hand, containing a draft on the Bank of Commerce, New York, being the amount of half of my pay for census, $603 62. It appears strange to me that the whole amount of my pay did not come; having done as you requested me in your letter of the 28th of June, 1852, confident that you would do as you said also, which is as follows:

"SIR: Referring to my letter to you of the 16th instant on the subject of your compensation as assistant marshal, I now herewith enclose you two receipts for first and second payments, $603 62 each.

"Should Mr. Merritt not have paid over to you on the receipt of this letter any portion of your pay, you will please sign the receipts and return them to this office, stating the fact. Upon their coming to hand a draft will be forwarded to your address.

"Under date of September 3, 1851, Mr. Merritt forwarded to this office a receipt signed by you for final payment, and it was at once passed into the treasury as a voucher, under the impression that payment had been made.

"Respectfully, your obedient servant,

"JOS. C. G. KENNEDY,

"*Superintendent.*"

I am justly entitled to the other half of my pay, and do yet look to the office for it. The way I am receiving it it is of little use to me. I am here unemployed and under expense for two years, waiting for my compensation for taking the census. What I have received the other day I could not call my own. It was not sufficient to pay my debts. I have no desire to ever do anything of the kind again for government. According to my oath of office, I done the work the best I was capable of, and expected to be justly compensated for it. In this case there is but little encouragement to the person that tries to do right. The marshal, Mr. Merritt, that has broken the confidence and trust reposed in him by you, has come out first best. Your honor seems to yet cling to his contradictory statements and false receipts. In your letter of June 25, 1852, to Hon. John G. Miller, House of Representatives, wherein you have said, "I have written to Mr. Merritt in relation to the delinquency, and urged (him) to discharge, according to his instructions, the claims of the assistants, he has failed to do so, and this office will see the demands of all legal claimants settled immediately." The receipt forwarded to the Census office by Mr. Merritt, under date of September 3, 1851, as he said, signed by me for final payment, and then admitting, in his letter to you of September 1, 1852, that the final half of my pay was yet due me, ($603 62,) raises the presumption that there can be no confidence placed in his statements. On hearing from Judge Joel Houghton the other day after the arrival of the mail, I told him that I had received only half of my pay. He said that when he was in Washington that he called on you, as I requested him in relation to my claim, and that

you pledged your word and honor to him that if I would sign the receipts and return them to the Census office, as you directed me, that on their coming to hand you would send me a draft for the amount. As I have done as you requested me, I confidently hope that you will send me the other half of my pay without any further delay.

I am, sir, very respectfully, your obedient servant,

JOHN GORMAN,
Assistant Marshal.

JOSEPH C. G. KENNEDY, Esq.,
Superintendent Seventh Census, Washington City, D. C.

No. 18.

TERRITORY OF NEW MEXICO, *County of Santa Fé:*

On this 21st day of October, A. D. 1854, personally appeared before me, Lewis D. Shutz, clerk of the first judicial district of the Territory of New Mexico, Joab Houghton, who being duly sworn according to law, declares that on the 3d day of August, 1852, he called on Joseph C. G. Kennedy, Superintendent of Census, in behalf of John Gorman, a deputy marshal for taking census in the Territory of New Mexico; that said superintendent stated to affiant that no receipts had been filed against said Gorman, nor did it appear from the records of the office that any money had been paid to him in compensation of services, though the whole amount due said Gorman had been entrusted to the hands of Charles H. Merritt for the purpose of paying his deputies, said Merritt being marshal for the district of New Mexico, but said marshal having failed to pay said Deputy Marshal Gorman, the Secretary of the Interior had decided to pay directly from the Census department the whole amount due, which was conceded to be $1,207 24; and said superintendent further stated that upon receipt from said Gorman he would forward to him a draft for said amount of $1,207 24. On the day of the said understanding with the Superintendent of Census, this affiant wrote the letter hereunto attached to said Gorman, which he asks to be made part of this affidavit.

This affiant further declares that afterwards, when in Santa Fé, he saw a letter from said Superintendent, enclosing a draft for $603 62, half the amount above specified as due said Gorman for services as deputy marshal aforesaid, and this affiant is fully advised that said Gorman has received no further compensation for his services.

J. HOUGHTON.

Sworn and subscribed before me. In testimony whereof, I have hereunto set my hand and seal of office, at Santa Fé, the day and year aforesaid.

[L. S.] L. D. SHUTZ, *Clerk.*

Copy of letter affixed to the foregoing.

WASHINGTON, *August* 3, 1852.

DEAR SIR: I have received the letters of Messrs. Quinn and Davy, dated 31st of May, on the 20th of June—too late to reply by the August mail. Yours of the 1st of July I received last night.

I called upon the Superintendent of Census upon the receipt of Messrs. Quinn and Davy's letters, and understood that the Secretary of the Interior had already received information on the subject from Mr. Merritt, and was told that your application would be taken under advisement. I called again this morning, and am happy to be able to inform you, by authority of the Superintendent, that upon forwarding your duplicate receipts you will be paid the full amount. The Superintendent says that if you will forward your receipts *directly to him* he will forward you a draft for the amount on New York. I would advise you to that course, and not intrust your affairs to agents here, who will only occasion you delay. You should by all means attend to it by return mail. Forward your receipts in duplicate.

There was no receipt of yours filed in the office, therefore Mr. Merritt did not forward the one you signed. It seems the money had been paid to him, as to many other marshals, to settle with the assistants, and on his individual receipt; and he having himself made a statement of his not having settled, the government pays, and looks to him for reimbursement.

I was left in charge, by Mr. Fuller, of the application of the assistant marshals of New Mexico for extra compensation under the supplementary census act. Though I have faithfully labored in the matter, I have not been able to accomplish anything with the Secretary of the Interior or the Superintendent—not a recommendation on which to base an application to Congress. Sometime since the Superintendent intimated that something would be allowed, and I wrote by last mail to that effect to Mr. Blumner; but to-day he says the Secretary of the Interior has decided that sufficient compensation has been allowed, and no more can be granted but by authority of Congress. Nothing can be done this session—it adjourns on the 31st. I have not seen Mr. Neely.

Truly yours,

J. HOUGHTON.

No. 19.

TERRITORY OF NEW MEXICO, *County of Santa Fé:*

This affiant, George H. Estes, makes oath and says that John Gorman, late United States assistant marshal for taking the census in the county of Rio Arriba, in this Territory, did receive, in the month of August, A. D. 1852, one receipt for his first half pay for six hundred and three dollars and sixty-two cents, and also at the same time one for a similar amount for his final pay; and that accompanying the

said receipts he received a letter from J. C. G. Kennedy, Superintendent of the Seventh Census, at Washington city, stating that inasmuch as Charles H. Merritt, United States marshal, had not paid him, that he should sign said receipts and forward them to his office, and that he would send him a draft for the money, and that the government would look to the said Merritt and his securities for the reimbursement of the money; and that the said Gorman did, in compliance with the request of said letter, in my presence, sign the two said receipts, and mailed them in the post office here, sealed in a good envelope, and directed to said Kennedy, Superintendent as aforesaid, with an accompanying letter, stating that he had never received payment for said services, or any part thereof; and that in the course of three or four months afterwards the said Gorman received a letter from said Kennedy, in answer to his said letter, enclosing a draft for six hundred and three dollars and sixty-two cents, one half of the amount due him, the said Gorman, assistant United States marshal as aforesaid, and that the balance still remains unpaid; and the said affiant further states that he knows the facts set forth here from the fact that he attended to all the business connected with this matter, and received and opened all communications address to said Gorman during said time.

GEORGE H. ESTES.

Sworn to and subscribed before me, the undersigned clerk of the United States district court for the first judicial district of the Territory of New Mexico.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, at Santa Fé, this twenty-first day of October, A. D. 1854.

L. D. SHEETZ, *Clerk.*

No. 20.

TERRITORY OF NEW MEXICO, *County of Santa Fé:*

This affiant, John Gorman, late assistant marshal of the United States for taking the census in the county of Rio Arriba, makes oath and says that he has never received from Charles H. Merritt, United States marshal, any pay or sum of money whatsoever for his services as deputy or assistant marshal as aforesaid, nor has he signed any receipts, except those referred to in the accompanying affidavit of George H. Estes, nor has he ever authorized or appointed any person to receive pay for him as assistant marshal as aforesaid.

JOHN GORMAN.

Sworn to and subscribed before me this 21st day of October, A. D. 1854.

In testimony whereof, I have hereunto set my hand and affixed my [L. S.] seal of office, at Santa Fé, this year aforesaid.

L. D. SHEETZ,
Clerk U. S. District Court, First District, New Mexico.

No. 21.

SANTA FÉ, *N. M.*, *September* 29, 1855.

I have been shown a letter from George C. Whiting, esq., Acting Secretary of the Department of the Interior, dated May 30, 1855, to Hamilton G. Fant, esq., of Washington city, in regard to the claim of John Gorman for remaining half amount due him for services as assistant United States marshal for taking census in the Territory of New Mexico. In that letter the Secretary is laboring under a misapprehension of the facts. The $603 62 were, it is true, included in the note given by me to Gorman, but after suit was withdrawn, by his order, from the amount of the judgment. No part of the balance of that judgment has ever been satisfied by me, nor have I ever been able to pay John Gorman any part of the amount due him. The other obligation I gave him for $603 62, which I understand has been forwarded to Hamilton G. Fant, esq., was given and intended as evidence of my indebtedness to Gorman, and that I had not been able to pay him, and was thus conditionally received by Gorman, and not in satisfaction of the claim.

I further certify that I have not been able, nor am I now able, to pay any part of this last-named amount.

C. H. MERRITT.

No. 22.

SANTA FÉ, *N. M.*, *July* 8, 1852.

SIR: I am requested by the foreman of the grand jury of this county to request you to forward to this place certified copies of all the receipts of John Gorman, assistant marshal of the Territory of New Mexico in taking the last United States census—for what purpose I am not informed.

I am, very respectfully, your obedient servant,

E. P. WEST,
U S. District Attorney.

Hon. ALEX. H. H. STUART,
Secretary of the Interior, Washington City, D. C.

No. 23.

CENSUS OFFICE, *Washington*, *September* 6, 1852.

SIR: Your communication of the 8th July, addressed to the Hon. Secretary of the Interior, was received and referred to this office today.

Agreeably to request therein contained, I send you copies of the re-

ceipts of John Gorman, assistant marshal in taking the census of part of New Mexico.

Very respectfully, your obedient servant,

JOS. C. G. KENNEDY,
Per WM. IRVING.

E. P. WEST, Esq.,
U. S. District Attorney, Santa Fé, N. M.

No. 24.

SANTA FÉ, *October* 31, 1354.

SIR: I having understood that John Gorman has made application to you for one half pay as assistant marshal, you will see by the enclosed papers that the half pay he claims has been long since paid. The credit appears on the execution in 1854, but was actually paid in 1852, and the first execution issuing in 1854, it was credited on it. I am indebted to the government about $1,500, which shall be paid as soon as possible within one year; but I do not want to pay government money that I have already paid to Gorman. I have understood that you will be addressed by J. L. Collins, of this place, on the subject. If Mr. Collins's word is worth no more in Washington than here, it is all right, as he is known here as one of the principal gamblers and monté dealers in the Territory, and consequently his word is regarded with suspicion. You will see by the enclosed papers that there are four persons garnisheed who will pay a part of the balance of the execution. I am well known to the Hon. John Letcher, who I write to by this mail. This letter you will not consider private by any means. In case this letter should not be satisfactory, please inform me before you conclude your decision in the matter.

Yours, respectfully,

C. H. MERRITT.

John Gorman in account with C. H. Merritt, 1849 to 1852.

DR.

March 23,	1850.—To cash.....	$15 00	
April 2,	1850.—To cash.....	40 00	
January 7,	1851.—To cash.....	25 00	
January 24,	1851.—To cash, order to McCoy & Co.....	25 00	
January 28,	1851.—To cash, paid copying blanks	11 84	
January 3,	1852.—To cash, order to Major C.....	50 00	
			$166 84
January 14,	1852.—To cash, my note, at one day, for.....		1,351 78
			1,518 62

PR. CONTRA CR.

December 3, 1849.—By cash	$325	00	
December 31, 1849.—By services	40	00	
September 12, 1849.—By cash	300	00	
September 30, 1849.—By cash	250	00	
September —, 1852.—By amount received from the Census office	603	62	
	1,518	62	$1,518 62

TERRITORY OF NEW MEXICO, FIRST JUDICIAL DISTRICT, }
County of Santa Fé. }

This day appeared before me, Lewis D. Sheetz, clerk of the United States district court for said district and Territory, Charles H. Merritt, late United States marshal for taking the census in said Territory, to me personally known, who, being duly sworn, deposes and says that previous to the 14th day of January, 1852, he had various dealings with John Gorman, late assistant United States marshal for taking the census in the county of Rio Arriba, a true statement of which appears in the foregoing account; and the amount of six hundred and three dollars and sixty-two cents, which appears therein to the credit of said Gorman, is the half pay received by him, the said Merritt, for Gorman, for taking the census as late assistant United States marshal, as aforesaid; and the deponent further says that on the 14th day of January, 1852, he gave his note (as charged in the foregoing account) to said Gorman for one thousand three hundred and fifty-one dollars and seventy-eight cents, in payment of all accounts and indebtedness on the part of the said Merritt to the said Gorman up to that date, and that said note was received by said Gorman as satisfaction for all indebtedness as aforesaid; and said deponent further states that on his arrival here in the month of July, 1852, he proffered to said Gorman the said sum of six hundred and three dollars and sixty-two cents, his compensation for taking the census in the county of Rio Arriba, as assistant marshal as aforesaid, and that the said Gorman requested him, the said Merritt, to retain the said money on deposit, as he had other moneys on deposit belonging to him, the said Gorman; and deponent further says that he never gave to said Gorman any other note for money than the one herein referred to.

C. H. MERRITT.

Sworn to and subscribed before me this 30th day of October, 1854.

[L. S.] In testimony whereof, I have hereto set my hand and seal of office.

L. D. SHEETZ, *Clerk.*

TERRITORY OF NEW MEXICO, *County of Santa Fé:*

I, Lewis D. Sheetz, clerk of the United States district court for the first judicial district of said Territory, certify that it appears from the

records of my office that John Gorman, on the 12th of June, 1852, brought suit against Charles H. Merritt for damages, on account of a certain promissory note, which is [in] the words and figures following, to wit:

SANTA FÉ, *January* 14, 1852.

One day after date I promise to pay to John Gorman, or order, one thousand three hundred and fifty-one dollars and seventy-eight cents, for value received, negotiable and payable without discount or defalcation, with ten per cent. interest from the 1st of January, 1851, until paid.

$1,351 78. C. H. MERRITT.

And afterwards, at the March term, 1853, of said court, on the 24th day of March, 1853, judgment was rendered in said cause against said Merritt for one thousand four hundred and seventy-five dollars and fourteen cents, and costs of suit; and afterwards, on the 18th day of March, 1854, execution was issued on said judgment for said amount; and afterwards, at the June term, 1854, of said court, the marshal returned said execution with the following indorsement, to wit:

"The plaintiff orders a credit of six hundred and forty-four dollars to be entered on this execution.

"H. N. SMITH,
"*Plaintiff's Attorney.*"

"I hereby certify that I have served in the within case four garnishees for the plaintiff, to wit: on F. A. Cunningham, on Preston Beck, jr., on G. Wethered Johnson & Co., and on Miguel E. Pino. Done at Santa Fé this 27th day of March, 1854.

"CHAS. BLUMNER,
"*United States Marshal.*"

I further certify that no further proceedings have as yet been had in this case.

Given under my hand and seal of office, at Santa Fé, this 30th day of October, A. D. 1854.

[L. S.]

L. D. SHEETZ, *Clerk.*

No. 25.

DEPARTMENT OF THE INTERIOR,
Washington, May 30, 1855.

SIR: In the case of John Gorman, who claims of the United States a balance of $603 62, alleged to be due him as his last half payment for taking the census of Rio Arriba county, New Mexico, it appears that Charles H. Merritt, who acted as census agent for the Territory of New Mexico, was intrusted by the United States with the said amount for payment to Gorman; that Merritt failed to pay over to Gorman at once, but that subsequently, in the settlement of an open account between them, Merritt gave Gorman a promissory note, including the said $603 62, on which note suit was brought and judg-

ment obtained; and, further, that on said judgment a payment of $644 has been made.

Under these circumstances, and Merritt having notified the department that he had finally paid over the money to Gorman, the department is of the opinion that the indebtedness of the United States has been merged by Gorman into that of Merritt, and regards the payment of $644 on the judgment as made on behalf of the United States as a preferred creditor. The present claim is, therefore, rejected.

Mr. Gorman's letter to you of the 31st of March is herewith returned. The papers which accompanied it will be retained on the files of the department.

I am, sir, very respectfully, your obedient servant,

GEO. C. WHITING,
Acting Secretary.

HAMILTON G. FANT, Esq.,
Washington, D. C.

SANTA FÉ, *March* 31, 1855.

SIR: I have learned that Mr. John Gorman has made another application to you by this mail in relation to the money which I have already paid him. I would respectfully refer you to my letter of the latter part of 1854. In relation to this matter, I can now only repeat that Mr. Gorman has been paid, and, if paid by you, will be paid for the second time. I do not know what Mr. Gorman will send you by this mail, but would ask that you would be kind enough to send me a copy of his proofs, should he send any by this mail, so that I can know what to refute. I again assure you that I have paid Gorman the money he now asks you to pay him. By writing me in regard to this matter before you act on it, and give me the proof now before you, sent by Gorman, I will be enabled to refute them by every necessary evidence, and will pledge my life that I can prove every word I have written you in regard to the matter by good affidavits.

Respectfully,

C. H. MERRITT.

The SECRETARY OF THE INTERIOR.

A.

Decision of the Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington City, February 12, 1856.

SIR: With reference to the claim of John Gorman, assistant marshal for taking the census of Rio Arriba county, New Mexico, to which you have again called the attention of this department, and in support of which additional papers have been presented, there seems to

be, on the part of Mr. Houghton, your correspondent, an entire misapprehension.

The Superintendent of the Census could not certainly have informed him in *August*, 1852, that the department held no receipts of Gorman in evidence of his having been paid by Merritt, for he had himself written three times to Gorman prior to that date that such receipts had been received during the last quarter of the preceding year, and *that his account "was balanced and closed" upon those very receipts.*

Upon being apprised of this fact, he will at once perceive that the aspect of the case is wholly changed, and that, whatever may seem to be the peculiar hardship to which Mr. Gorman is subjected, it all results from his own action in the premises.

The decision heretofore made by the department is fully sustained, upon a full and careful consideration of all the evidence before me, a copy of which is herewith furnished.

I am, sir, very respectfully, your obedient servant,

R. McCLELLAND, *Secretary.*

H. G. FANT, Esq.—*Present.*

ALEXANDER M. JACKSON, administrator of JOHN GORMAN, deceased, *vs.* THE UNITED STATES.—No. 812.

John S. Watts, the attorney of the claimant, now moves the court to strike out the evidence of Moses Kelly, and suppress the same, for the reason that upon the face of said evidence it appears that the witness testifies to the handwriting of John Gorman, when the only knowledge of the witness as to the handwriting of John Gorman results from comparison of hands, which testimony is illegal, and should be suppressed.

JOHN S. WATTS,
Attorney.

DEPARTMENT OF THE INTERIOR,
Washington, March 14, 1860.

SIR: In reply to your communication of the 10th instant, received yesterday, wherein you express a desire to see letters from John Gorman to Mr. Kennedy, "dated January 31, 1852, and May 9, 1852," I would inform you that there is no letter on file from John Gorman to Mr. Kennedy of the latter date, nor is any reference made to any letter of that date in the correspondence of Mr. Kennedy with Mr. Gorman thereafter; but there is a letter of Mr. Kennedy in reply to the letter first referred to, which is dated March 9, 1852, which, in the absence of any letter of May 9, and of any reference to such letter, I presume to be the letter desired.

I therefore transmit herewith a copy of the letter of John Gorman to Mr. Kennedy, (as you desire,) dated January 31, 1852, and a copy of Mr. Kennedy's reply thereto, dated March 9, 1852.

Very respectfully,

J. THOMPSON,
Secretary.

JOHN D. MCPHERSON, Esq.,
Deputy Solicitor, Court of Claims.

SANTA FÉ, NEW MEXICO,
January 31, 1852.

SIR: I have the honor to address you on official business, although personal to myself. In September, 1850, I was employed by Captain C. H. Merritt, then marshal of the Territory of New Mexico, as an assistant to take the census; and thus employed, I took the census of Rio Arriba county, and made the returns accordingly. Having thus discharged my duty, I hoped and supposed that I should be paid in due time.

I have received nothing for my services, and think that ample time has elapsed since I rendered the service to have received payment. Conversing with Colonel Woolley, now Indian agent for the Territory of New Mexico, he stated to me that on my case being laid before you I would receive a reply fully to the subject-matter of my inquiry. I beg you, sir, to consider my case, and to give me full information in relation to the subject-matter of my inquiry. I have rendered the service, and ought to be paid, and should be paid, and would wish to learn from you the cause that it is withheld.

Mr. Merritt told me, when he came from Washington, that he had received half of my pay, and kept promising to pay it over to me, but did not. He told me, also, that he had written on to Washington for the other half of my pay; that he could not have received but half at the time he was in Washington without the power of an attorney from me. Up to this date he says he has not heard anything from it.

Sir, I hope you will take my case into consideration. I am a poor man, without a dollar in my pocket, and at present without employment, here under expenses, waiting all this time for my pay. If it is as Mr. Merritt says, that there is yet half of my pay coming, I wish I could receive it without coming through his hands, for I believe he intends cheating me.

I have the honor to be, very respectfully, your obedient servant,

JOHN GORMAN.

[Copy of note indorsed on John Gorman's letter of January 31, 1852, by the bookkeeper in the Census office.]

OCTOBER 28, 1851.

Marshal C. H. Merritt returned receipt for $603 62, under cover of date September 3, signed by Gorman, for final payment; and it was presumed he had paid Gorman the amount, as he had been advanced funds whilst here in Washington, April 18, 1851, for that purpose.

BLANCHARD.

Gorman's account is balanced and closed. The amount is $1,207 24.

CENSUS OFFICE,
Washington, March 9, 1852.

SIR: I have just received your letter of the 21st of January, having relation to your compensation for services as assistant marshal in taking the census of New Mexico, and, in reply, would inform you that when Mr. Merritt was here, in April last, funds were placed in his hands to pay *all his assistants;* and as he returned to this office, under date of September 3, your receipt (signed by you) for final payment, it was presumed he had paid you in full. I regret very much to learn that this has not been done, and will at once write to the agent, Mr. Merritt, in relation to the matter. You will see that no blame attaches to this office, and that to its action the delay is not attributable. The money was placed in the hands of Mr. Merritt to facilitate the settlement of the claims of his assistants, and those whom he has paid received their money much earlier than they could have done had it been sent by mail, and the dangers, as well as the delays, of mail carriage to New Mexico were in this avoided.

The whole amount of your claim, as rendered and paid, is $1,207 24. Your account is balanced and closed.

JOSEPH C. G. KENNEDY,
Superintendent of Census.

JOHN GORMAN, Esq.,
Assistant Marshal, Santa Fé, New Mexico.

IN THE COURT OF CLAIMS.

JOHN GORMAN *vs.* THE UNITED STATES.

Testimony of Moses Kelly, esq., for the United States, taken before Edmund F. Brown, commissioner for the District of Columbia.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

On the twenty-second day of June, A. D. eighteen hundred and fifty-nine, personally came Moses Kelly, esq., the witness within named, and after having been first sworn to tell the truth, the whole

truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

EDM. F. BROWN,
Commissioner of the Court of Claims.

Fees of witness, none. Attendance, one day.

Commissioner's fees.

Taking testimony, five pages—1,150 words, at 20 cts. per 100.	$2	30
Oath		10
One day's attendance at solicitor's office, $3; this case half.....	1	50
	3	90

The deposition of Moses Kelly, esquire, taken at the request of R. H. Gillet, esquire, solicitor of the Court of Claims, before Edmund F. Brown, commissioner for the District of Columbia, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of John Gorman *vs.* United States.

First general interrogatory by the commissioner. Please to state your name, your occupation, your age, your place of residence the past year; whether you have any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, you are related to the claimant.

Answer. My name is Moses Kelly; my occupation, chief clerk of the Department of the Interior; my age is forty years; my residence the past year Washington city. I have no interest, direct or indirect, in the claim which is the subject of inquiry; and am in no degree related to the claimant.

First interrogatory by the solicitor. Were you ever disbursing agent of the Department of the Interior; and if so, when, and how long?

Answer. I was; from the 1st of July, 1853, until about October, 1856; but not for the disbursement of the Seventh Census fund. Mr. Williamson and Mr. Clarke were the disbursing agents for the census at different periods.

Second interrogatory. When you were such disbursing agent, was the receipt now shown you in the possession of Charles T. Jones, esq., before you, when, and for what purpose?

Answer. It was not before me officially; I had occasion to refer to it on file in the Treasury Department. It was probably in the latter part of 1855, or early in 1856, when I was called upon to prepare a report on a claim of said Gorman, for the amount of the same, which he claimed still to be due.

Third interrogatory. Was the claim of the plaintiff in this case for anything, and what, presented to you for examination or settlement; and if so, when; and what papers were then presented by him or his agents, and when, upon which the claim was based?

Answer. His claim was for a sum of money which had been found due him by the Census office, for services rendered in New Mexico as assistant marshal, amounting to six hundred and three dollars and sixty-two cents. The marshal of New Mexico claimed to have paid it. He denied having received it. The amount claimed was for the first half due him on account of that service.

On the 6th of December, 1854, Evans & Fant presented, as his attorneys, the following papers, viz:

Letter from J. L. Collins to them, dated Santa Fé, New Mexico, October 23, 1854, enclosing a letter of the same date from said Collins to the Secretary of the Interior. Accompanying these were an affidavit of J. Houghton, dated Santa Fé, 21st October, 1854; an affidavit of the same date from George H. Estes, and one of John Gorman, likewise of the same date, taken before L. Sheetz, clerk of the United States district court of the first district of New Mexico, and attested by the seal of said court. All of these affidavits alleging that the money was still due and had never been paid.

Many other papers and considerable correspondence was also before me, having reference to the same subject. In this correspondence there was a letter from John Gorman to J. C. G. Kennedy, Superintendent of the Census, dated August 31, 1852; one from the same to the same, dated March 27, 1853; and one from the same to the same, dated March 27, 1853; all of which, together with those above referred to as having been presented by Evans & Fant on the 6th December, 1854, are now before me, and belong to the files of the Interior Department.

Fourth interrogatory. State whether from the papers last above mentioned as having been signed by John Gorman you have become acquainted with his handwriting and signature; and whether from your knowledge thus acquired you believe that the signature of said plaintiff produced by said Jones is genuine and in said Gorman's handwriting.

Answer. I have become acquainted with the handwriting and signature of said Gorman, and believe the signature on the receipt produced by said Jones to be the genuine signature of the said John Gorman.

Second general interrogatory by the commissioner. Do you know of any other matter relative to the claim in question? If you do, state it.

Answer. The other matters within my knowledge are contained in my report to the Secretary of the Interior, dated February 11, 1856, which is referred to in the plaintiff's petition in this cause.

I have recently been informed (I believe by Judge Watts, of New Mexico,) that John Gorman, the said plaintiff, has died since he presented his claim to this court.

MOSES KELLY.

Sworn to and subscribed before me this 22d day of June, 1859.

EDM. F. BROWN,
Commissioner.

IN THE COURT OF CLAIMS.

JOHN GORMAN *vs.* THE UNITED STATES.

Testimony of Charles T. Jones, esq., for the United States, taken before Edmund F. Brown, commissioner for the District of Columbia.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

On the twenty-second day of June, A. D. eighteen hundred and fifty-nine, personally came Charles T. Jones, esq., the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

EDM. F. BROWN,
Commissioner of the Court of Claims.

Fees of witness, none. Attendance, one day.

Commissioner's fees.

Taking testimony, four pages—900 words, at 20 cts. per 100...	$1 80
Oath	10
One day's attendance at solicitor's office $3; this case half..	1 50
	3 40

The deposition of Charles T. Jones, esq., taken at the request of R. H. Gillet, esq., solicitor of the Court of Claims, before Edmund F. Brown, commissioner for the District of Columbia, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of John Gorman *vs.* United States.

First general interrogatory by the commissioner. Please to state your name, your occupation, your age, your place of residence the past year; whether you have any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, you are related to the claimant.

Answer. My name is Charles T. Jones; my occupation, chief clerk of the Register's office, Treasury Department; my age is forty years; my residence the past year, temporarily in Washington city. I have no interest, direct or indirect, in the claim which is the subject of inquiry, and am in no degree related to the claimant.

First interrogatory by the solicitor. Have you in your possession, and now here present, what purports to be a receipt signed John Gorman; and if so, when did you first see it, and where did you find it, and for what purpose was it apparently in the place where you found it?

Answer. I have in my possession such a receipt. I first saw the same some few days since. I found it with the settled account of R. H. Williamson, disbursing agent of the Seventh Census fund, on file in the Register's office of the Treasury Department. It was on file as a voucher in favor of the said disbursing agent for the sum of six hundred and three $\frac{6}{100}\frac{2}{0}$ dollars as a payment to the said Gorman as assistant marshal, and so allowed in the accounts of said Williamson by the accounting officers of the Treasury Department. The following is a true copy of said voucher:

To R. H. Williamson, esq., disbursing agent of census fund:

SIR: Mr. John Gorman, the assistant for the subdivision of Rio Arriba county, district of New Mexico, having made his returns to the marshal of said district, and the same having been received at this office with a proper certificate of said marshal thereto annexed, and it appearing that said John Gorman is ultimately entitled to receive twelve hundred and seven $\frac{2}{1}\frac{4}{0}\frac{}{0}$ dollars should his returns on examination be found conformable to the act of May 23, 1850, you will pay to said assistant six hundred and three $\frac{6}{1}\frac{2}{0}\frac{}{0}$ dollars (being the one half of said full amount,) according to the 21st section of the act aforesaid, the same having been approved by the Secretary of the Interior.

$603 62—drawn check to order of C. H. Merritt.

J. C. G. KENNEDY,
Superintendent Seventh Census.

CENSUS OFFICE, DEPARTMENT OF INTERIOR, *April* 18, 1851.

Received of R. H. Williamson, esq., disbursing agent of the Seventh Census fund, six hundred and three $\frac{6}{1}\frac{2}{0}\frac{}{0}$ dollars, being the first half payment of the amount due me as assistant marshal.

JOHN GORMAN,
Ass't Marshal, Arriba County, District of New Mexico.

2d general interrogatory by the commissioner. Do you know of any other matter relative to the claim in question? If you do, state it.

Answer. I do not.

CHARLES T. JONES.

Sworn to and subscribed before me this 22d day of June, 1859.

EDM. F. BROWN,
Commissioner.

UNITED STATES COURT OF CLAIMS.

JOHN GORMAN *vs.* UNITED STATES.

Brief of claimant.

John Gorman, under the act of Congress of May 23, 1850, took the census of Rio Arriba county, New Mexico. He was entitled for his services to $603 62. By act of Congress 30th of August, 1850, he was allowed the further sum of $603 62, his compensation having been increased one hundred per cent., thus making due him $1,207 24, distinguished as first half and second half payments. Gorman's accounts were certified for payment April 18, 1851, and May 3, 1851. At that time J. C. G. Kennedy was Superintendent of the Seventh Census, and Charles H .Merritt was marshal of the Territory of New Mexico; and Mr. Kennedy, without authority from Gorman, on the 18th day of April, 1851, placed the first half pay of Gorman, $603 62, in Merritt's hands; and on the 3d day of May, 1851, he placed the second half pay, $603 62, in Merritt's hands, with directions to pay it over to Gorman, and take and forward his receipts. Under date of September 3, 1851, Merritt sends the receipts of Gorman for his final payment. All right, the business is closed. January 31, 1851, Gorman writes to Kennedy about his money; wishes to know why he does not get his pay, and what amount is due him. March 9, 1852, Kennedy writes to Gorman in reply: "I paid your money to Merritt; under date September 3, 1851, he sent your receipts; the amount was $1,207 24." May 1, 1852, Gorman replies: "I want my pay; Merritt has not paid me; I did not give them receipts." June 16, 1852, Kennedy replies: "We paid Merritt to pay you; we have your receipts; we can't pay you now; eventually you will be paid; we will investigate the matter soon, and write to you on the subject." June 24, 1852, Hon. John G. Miller writes to Mr. Kennedy about the case of Gorman. Mr. Kennedy, on the 25th June, 1852, replies, and recites the previous correspondence with Gorman, and assures Mr. Miller that immediate arrangements will be made to pay Gorman, and admits that Merritt had failed to pay Gorman, and that "his office would see the demands of all legal claimants settled immediately." In pursuance of that praiseworthy promise, on the 28th June, 1852, Mr. Kennedy writes to Gorman, sending two receipts for first and second half pay, and says to Gorman, "when you get this letter, if Merritt has not paid you, sign these receipts, send them to me, and I will send you the money." At this state of the case, Mr. Kennedy, 9th of March, 1852, opens a correspondence with Mr. Merritt, and says: "Merritt, Gorman writes me you have not paid him any portion of the $1,207 24 I gave you in April last to pay him. I hope you will pay him, or make satisfactory explanation." April 8th, Mr. Kennedy writes to Merritt again, and says: "Mr. Blumner says you have not paid him; please explain." May 5th, 1852, Mr. Kennedy writes to Merritt and says: "Mr. Williams says you have not paid him. Please let me hear from you on this subject." June 29th, 1852, Ken-

nedy writes to Merritt and says: "Tell me what you have paid Gorman, Blumner, and Williams. I have sent Gorman receipts for first and second half; Williams for second half; Blumner for first half; and promised to forward drafts for the same on the return of the receipts, if you have not paid the money. You say, in letter of April 30, that Gorman has received one half. Be explicit on this point, and send us the money we gave you to pay Assistant Marshal J. D. Robison." And in a P. S. he says to Merritt: "I don't want to prosecute you; the penalty is very severe for default in disbursers. Can't you give security to pay in twelve months, by bond of yourself and father? If you do not do this, I will put the United States attorney after you. You will be exposed, and perhaps punished severely. I make these suggestions for your benefit." August 31, 1852, Merritt responds, and says: "I have paid in full all my assistants but Gorman, Williams, and Blumner, and I have paid them first half each. I owe the government $1,502 30; send on your bond, and will give the security if it was ten times as much; and am under lasting obligations for the suggestions in your P. S." September 1, 1852, Merritt writes to Kennedy again, and says: "In my letter of yesterday, I thought I could arrange with Gorman the second half payment, but find I can't; so there is $603 91, being second half pay, due him. Send on your bond, and I will give the security. If the assistants here would take my obligation, with security, the matter could be arranged here, but they have refused to do it since they received your last letter." March 27, 1853, Gorman writes to Kennedy: "I have got $603 62 in draft, by letter of February 4, 1853; it is strange you did not send me the other half. I complied with your request of June 28, 1852, and sent the receipts. I am entitled to my pay; I look to the office for it; I did my duty faithfully, and expect to be paid for it justly. There is no encouragement for a man to do right. Merritt, who has broken his trust, comes out first best. September 3, 1851, Merritt sent a receipt, which he says I signed, for final payment; but in his letter of September 1, 1852, he admits there is due me $603 62. Does not this show his statements are unworthy of credit? I signed the receipts as you directed, and Judge Houghton says you pledged your word and honor to send me the money. Why do you not send me the balance without delay?" February 8, 1853, Mr. Kennedy calls the attention of the Secretary of the Interior, Hon. A. H. H. Stuart, to the matter; advises a bond to be sent to Merritt, to secure the $1,502 30 which he admits due, and also says, August 31, 1852, "Gorman sent to him an affidavit that up to that time nothing had been paid him by Merritt; but that Merritt contended the first half had been paid him, and the question of the first half payment, $603 62, would be held in suspense." Whether the bond was ever executed or not I am unable to say. Gorman, in his affidavit, dated October 21, 1854, states, under oath, that he had never received from Merritt any part of his pay for his services, nor signed any receipts, except those enclosed to him in Mr. Kennedy's letter of June 28, 1852; and, in support of his statements, he sends affidavits of J. Houghton and George H. Estes, dated October 1, 1854. On the 30th of October, 1854, Merritt sends on his affidavit, in which he states that before the

14th day of January, 1852, he had dealings with Gorman, and owed him a balance of $1,351 78, for which he gave Gorman his note, and the $603 62, first half pay due Gorman, was included in the note; that the note was given by him and received by Gorman in payment of all accounts and indebtedness to Gorman by him. He also states that in July, 1852, he proffered to Gorman $603 62, his pay for taking the census of Rio Arriba county; that Gorman requested him to retain it on deposit, as he had other money on deposit belonging to him; and that he never gave Gorman any other note for money but that one. Accompanying this affidavit, under date of October 31, 1854, Merritt writes to Kennedy, and sends him a copy of the note of January 14, 1852, showing that he had been sued on the note; that judgment was rendered March 24, 1853; that execution issued March 18, 1854, and was returned June, 1854, endorsed "The plaintiff orders a credit of six hundred and forty-four dollars to be entered on this execution. H. N. Smith, plaintiff's attorney;" and says, "you will see by the papers sent that the first half pay Gorman claims has been long since paid. The credit appears on the execution in 1854, but was actually paid in 1852, and the first execution issuing in 1854, it was credited on it. I owe the government $1,500; I will pay it in a year," &c. In this letter it will be seen that Merritt does not pretend that he paid in money the $644, but refers to the amount having been paid in 1852. Now, there is no pretence that Merritt paid Gorman, in 1852, that amount in any other way than by note. The amount was included in the note, as stated in Merritt's account. March 31, 1855, Merritt again writes: "Gorman is again trying to get his pay. I have paid him, and refer you to my letter of October, 1854. Send me a copy of his proofs, and I will pledge my life I will sustain all I have said." Mr. Whiting now takes up the case, as Acting Secretary of the Interior, and very rightly comes to the conclusion, in his letter of May 30, 1855, "that as Gorman had taken note of Merritt, including $603 62 due him from the United States, had sued on it, got judgment, and collected $644 on the judgment, that he had received a draft from the government for $603 62, which, with the amount of $644 paid by Merritt, would discharge the claim of Gorman." The conclusion of Mr. Whiting was based upon the fact that Merritt had, in fact, paid to Gorman the $644 credited on the judgment. This letter of Mr. Whiting is shown to Mr. Merritt, and, September 29, 1855, which is the last time we hear from Merritt, he says: "I have seen Mr. Whiting's letter of May 30, 1855, in relation to the claim of John Gorman. Mr. Whiting is laboring under a misapprehension of the facts. The $603 62 were, it is true, included in the note given by me to Gorman, but, after suit, were withdrawn by his order from the amount of the judgment. No part of the balance of that judgment has ever been satisfied by me, nor have I ever been able to pay John Gorman any part of the amount due him. The other obligation I gave him for $603 62, which, I understood, has been forwarded to Hamilton G. Fant, esq., was given and intended as evidence of my indebtedness to Gorman, and that I had not been able to pay him, and was thus conditionally received by Gorman, and not in satisfaction of the claim. I further certify that I have not been

able, nor am I now able, to pay any part of the last-named amount." With these additional facts before the department, showing that Merritt had not, in fact, paid to Gorman any part of the amount due him, Mr. Moses Kelly takes the case under review, and, on the 11th day of February, 1856, after reflecting upon the case for five months, he makes a report to the Hon. Robert McClelland, reciting the history of the case from the beginning, and arrives at the conclusion that the decision of Mr. Whiting, made May 30, 1855, must be regarded as conclusive, unless Gorman can clearly show that the signatures to the receipts furnished by Merritt, in September, 1851, are forgeries. The reasoning of Mr. Kelly is this, in substance: 1. "We have got your receipts, sent to us September 3, 1851, by Merritt, and if you (Gorman) was fool enough to give him your receipts without getting the money, the government is not now bound to pay you, and you must lose it. 2. Merritt says he was your banker; that he gave you note for what he owed you; you sued him on it; and if you can't get the money we sympathize with you, my dear fellow—are sorry for you; you ought not to have acted so foolish as to trust Merritt with your money when he offered it to you; but as for paying you a cent of the balance due you, we do not intend to do it unless you prove those receipts are forgeries." In a letter of February 12, 1856, the Hon. R. McClelland endorses the report of Mr. Kelly, and, by way of consolation to Mr. Gorman, tells him if there is any hardship results to him from the loss of his money, it is the result of his own folly in the premises. Since that time, Mr. Gorman forwards to the department the affidavit of Mr. Houghton, showing that when the credit was entered on the judgment of Gorman against Merritt, of $644, it was so entered, not because Merritt had paid Gorman anything, but because the government had sent Gorman $603 62; and the amount so sent was credited on the judgment because it was not just for Gorman to hold a judgment against Merritt for all his pay after the government had paid him one half. Mr. Kelly, when commenting upon this part of the case, says: "The credit was not endorsed upon the judgment in consequence of any payment having been made to Gorman by Merritt, but by withdrawing from the judgment so much of the note as included the first half payment." Here Mr. Kelly falls into a blunder of fact. The credit endorsed had no reference whatever to the first half payment. Merritt, September 1, 1852, admits that second half payment had not been made to Gorman. February 4, 1853, Mr. Kennedy sends draft to Gorman, not for first half but for second half payment, $603 62. This draft did not reach Gorman until the 27th day of March, 1853; and on the 24th day of March, 1853, three days previous, Gorman had obtained judgment on the note against Merritt for the amount of both first and second half payments, and when he issues execution, he endorses a credit of the amount of this second half payment on the judgment, for, as an honest man, he could not collect from Merritt an amount included in the judgment, which amount the United States had paid him after the judgment had been obtained. The balance now due on the judgment has relation to the first half payment, and has never been withdrawn from the judgment, but stands there yet unpaid.

Such is a brief and substantial history of the various facts in this case. Before presenting the points and evidence in this case before the court, it is a matter of some moment to ascertain upon whom is located the burden of proof in this matter. The government, in the letters of Mr. Kennedy, dated April 18 and May 3, 1851, admits indebtedness to Gorman of $1,207 24, and paid it to Merritt without authority from Gorman. This makes out the case of Gorman, and it now rests with the government to show that the amount has bene paid by Merritt to Gorman. How does the government show that such payment has been made? The government says: 1. "We sent you draft for second half payment, $603 62." Gorman replies: "All right; I am not asking payment of second half, but first half." Government replies: "We have your receipt of September 3, 1851, for first half payment." Gorman says: "I send you my affidavit that I never gave that receipt; that Merritt has never paid me a cent; and I send you also letter of Merrit, dated September 29, 1855, in which he admits I have never been paid anything by him." The government replies: "Prove the receipt is a forgery, and we will then pay you, otherwise we will not.

I now submit to the court the following propositions:

1. That after Gorman upon his oath stated he did not execute the receipts of September, 1851, the government must prove that they are genuine before it can excuse itself from liability, and that no such proof is produced.

2. That if the receipts were, in fact, executed by Gorman, and nothing was paid him, he is still entitled to the balance unpaid, for a receipt is not conclusive, but may be "explained, qualified, or contradicted."—(See United States Digest, volume 12, page 513.)

3. The note given by Merritt to Gorman did not extinguish the liability of the United States to Gorman.—(See Watkins *vs.* Hill, 8 Pick. 522; Thacher *vs.* Dinsmore, 5 Mass. 299; Greenwood *vs.* Curtis, 6 Mass. 358.

4. That the unsworn opinion of Mr. Kelly, resulting from mere comparison of handwriting, from which he determines that the receipts of September 3, 1851, are genuine, is not sufficient evidence of that disputed fact.—(See Little *vs.* Beazly, 2 Ala. 703; Page *vs.* Homans, 2 Shep. 478; Wilson *vs.* Kirkland, 5 Hill, 182; The people *vs.* Spooner, 1 Denio, 343.)

5. That the government having, without the consent of Gorman, made Merritt its agent to pay Gorman—if loss is to occur to either party by the misconduct of Merritt—it is more just that the government, who trusted Merritt, should pay the money twice, than that Gorman should be compelled to lose payment for his labor.—(See Chitty on Contracts, note (1,) page 700.)

6. That if the liability of the government was, in fact, extinguished by the receipts of September 3, 1851, the letter of Mr. Kennedy of June 28, 1852, revived the liability of the United States.—(See Chitty on Contracts, page 56.)

It is not intended in this case to question at this time the correctness of the opinions of this court upon the subject of interest, but

that, in accordance with said decisions, interest may be allowed the claimant in this case. In the case of White *vs.* The United States, the Court of Claims held that "the ordinary principles of law and morality which are applied to regulate the dealings of individuals are applicable to transactions between the United States and their citizens." It is contended in this case that the "ordinary principles of law and morality" entitle the claimant to interest on the amount due him. It is not denied that the general English common-law rule upon the subject of interest is, "that the debtor is not bound to pay interest on the sum he owes;" but it is contended by me that the adjudications of the American courts have established an American common law, founded upon principles of equity, justice, and common sense, under which interest may be and is recovered under certain circumstances. From these American authorities the following general rule may be deduced: That "where the money of one person has been detained wrongfully, or been used by another, or where it has been kept by him when it should have been paid over, interest is properly chargeable in an action to recover it."—(See Dodge *vs.* Perkins, 9 Pick. 369; Knight *vs.* Reese, 2 Dallas, 182; Bell *vs.* Logan, 7 J. J. Marsh. 594; Vance *vs.* Vance, 5 Monroe, 251; Sellick *vs.* French, 1 Conn. 33; Hubbard *vs.* Charleston Railroad Company, 11 Metcalf, 124; Johnson *vs.* Eicke, 7 Halsted, 316; Marion *vs.* McRae, 1 Cheves's Laws, 61; Wood *vs.* Robbins, 11 Mass. 504; Evarts *vs.* Nason, 11 Vermont, 122; Hudson *vs.* Tenny, 6 N. Hamp. 456; Chancy *vs.* Yeaton, 1 N. Hamp. 151; Winslow *vs.* Hathaway, 1 Pick. 211; Greenly *vs.* Hopkins, 10 Wend. 96; Lynch *vs.* Deviar, 3 Johns. Ca. 303; Shipman *vs.* Miller, 2 Root, 405; Simpson *vs.* Teltz, 1 McCord, 64, 213.)

Should the above positions be well founded in law and sustained by the facts, it is contended that the claimant is entitled to bill for his relief for $603 62, with interest.

JOHN S. WATTS,
Attorney for Claimant.

IN THE COURT OF CLAIMS.

JOHN GORMAN *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim for services in assisting to take the census of 1850 *in New Mexico.*

MATERIAL AVERMENTS IN THE PLAINTIFF'S PETITION.

1. That he was engaged in 1850 in taking the United States census in New Mexico.

This is admitted, with this addition, that he was employed by Charles H. Merritt, United States marshal of that Territory, as his assistant.

2. That his services were not paid for, except in part, and that there is due him therefor the sum of $603 62, for which the United States are liable.

Both the fact and the conclusion of law are denied.

3. The petition admits that the United States paid him $603 62, being the second part payment.

4. The plaintiff denies that he executed receipts for the amount of his services, but admits that he took said Merritt's note for $1,351 78, but denies that he received it as payment, and avers that he was never able to collect it.

It is claimed by the defendants that plaintiff did execute said receipts, and that they were forwarded to the Census office, and, except as to the $603 62 subsequently paid by the United States, the same were allowed to the disbursing agent for the census, without even notice from the plaintiff that the same had not been paid.—(See evidence of Jones and Kelley, supplemental record, pp. —.)

MATERIAL FACTS ESTABLISHED BY THE EVIDENCE AS UNDERSTOOD BY THE SOLICITOR.

1. Charles H. Merritt was marshal of New Mexico at the time of the services in question.—(Petition, Record, p. 3.)

2. That plaintiff was an assistant appointed by Merritt to take the census in 1850 in Rio Ariba county.—(Record, p. 18.)

3. That his services were estimated at $603 62, but subsequently they were increased, under a law of Congress applicable to certain Territories, one hundred per cent.—(Record, p. 18.)

4. On the 18th of April, 1851, the Census bureau gave Merritt, in a draft, $603 62 to pay the first or original amount for taking the census, and on the 3d of May the Census bureau sent blank receipts, to be filled up and returned, for the further sum of $603 62, to pay the additional amount allowed under the act of 30th of August, 1850, allowing additional compensation for taking the census in California, Oregon, Utah, and New Mexico, (9 U. S. L., p. 445.)—(Record, pp. 22, 23.)

5. That on the 3d of September, 1851, Merritt forwarded to the Census bureau plaintiff's receipt for $603 62, and one signed by him in blank.—(Record, pp. 18, 24, 25.)

6. The blank receipt was filled up with the sum of $603 62, being the amount of the addition which had been sent by Merritt for plaintiff, and both were filed away and the matter treated as closed.—(Record, pp. 18, 31.)

7. On learning that the additional allowance had not, in fact, been paid by Merritt to plaintiff, that sum was paid directly to the latter by the Census bureau, and his receipt taken therefor.—(Record, pp. 31, 32.)

8. That the plaintiff, some months after he gave Merritt the receipt for the first part of the census money, took from him his note, which included the same and perhaps the additional compensation, and also some other sum; said note amounting to $1,351 78.—(Record, pp. 21, 22; Houghton's evidence, Record, p. 9.)

9. The plaintiff brought suit upon this note against Merritt and recovered judgment for the amount, with interest, in 1853, and execution was issued thereon on the 18th of March, 1854, for $1,435 11, on which there is an endorsement of $644.—(Record, pp. 9, 10.)

10. The execution was served on the 27th of March on five garnishees; but there is no evidence as to what further was done under it.—(Record, p. 10.)

11. There is no sufficient evidence that Merritt did not, in fact, pay plaintiff the $603 62 which was sent to him by the disbursing agent of the Census bureau on the 18th of April, 1851, and which he receipted.—(See receipt, Record, p. 24.)

Plaintiff's own oath cannot be considered as evidence to defeat his receipt.

The confessions of Merritt are not evidence, however proved.

But the plaintiff has disproved his own assumptions by making Kelley's report and the papers attached a part of his evidence. Among his papers is the sworn statement of Merritt, and also a letter from him; both of which, being furnished by him, the defendants have a right to use against him.

Merritt gives a statement of his accounts with plaintiff, crediting him forty dollars for services, $875 for cash, and $603 62 received from the Census office. He shows that he owed plaintiff $1,351 78. Merritt then made oath on the 30th of October, 1854, to the truth of this statement as follows:

"That previous to the 14th day of January, 1852, he had various dealings with John Gorman, late assistant United States marshal for taking the census in the county of Rio Ariba, a true statement of which appears in the foregoing account, and the amount of $603 62, which appears therein to the credit of said Gorman, is the half pay received by him, the said Merritt, for Gorman for taking the census as late assistant United States marshal, as aforesaid; and the deponent further says, that on the 14th day of January, 1852, he gave his note (as charged in the foregoing account) to said Gorman for $1,351 78 in payment of all accounts and indebtedness on the part of the said Merritt to the said Gorman up to that date, and that said note was received by said Gorman as satisfaction for all indebtedness as aforesaid; and said deponent further states, that on his arrival here in the month of July, 1852, he proffered to said Gorman the said sum of $603 62, his compensation for taking the census in the county of Rio Ariba, as assistant marshal as aforesaid, and that the said Gorman requested him, the said Merritt, to retain the said money on deposit, as he had other moneys on deposit belonging to him, the said Gorman; and deponent further says, that he never gave to said Gorman any other note for money than the one herein referred to.—(Record, p. 38.)

C. H. MERRITT.

The same leading statement is in a letter of Merritt's dated October 31, 1854, (Record, p. 37,) and is reiterated on the 31st of March, 1855.—(Record, p. 40.)

Merritt, in his letter of August 31, 1852, also stated that he had

paid Gorman $603 62, being the first half, and that he expected to settle the second half.—(Record, p. 29.)

But the next day after he wrote that he had seen Gorman and could not do so.—(Record, p. 30.)

The receipt given by Gorman is full evidence that he received the first $603 62. Merritt's letters and affidavit confirm that evidence. The receiving of Merritt's note, the suit upon it, the judgment and execution, all go to strengthen this evidence. There is no evidence to impeach the validity or effect of the receipt. The hearsay statements called out from plaintiff's witness are not evidence to show that the money was not paid as stated in the receipt.

11. The receipt of plaintiff for the first half was treated as evidence of payment at the treasury, and allowed to the disbursing agent of the Census bureau —(Kennedy's letter of March 9, 1852, Record, p. 24 ; Jones' evidence, Supplemental Record, p. .)

Hence, it appears that the United States have once paid this first part by allowing the receipt therefor in the settlement with the disbursing agent. If now paid, it will be paid a second time, and that too in consequence of the plaintiff signing a receipt as evidence of truth which he now says is untrue.

12. The second half has been paid, and its payment is admitted in the petition and is undisputed.

13. The plaintiff signed the receipt for the first half of the amount due.

The plaintiff, in his petition, says :

"Your petitioner, for a history of the facts and the action of the Department of the Interior upon said claim, refers to the report of Moses Kelley, made February 11, 1856, and the reply thereto of your petitioner through his counsel, dated September 2, 1856, and the affidavits, letters, and papers on file in the said department, and alluded to in the said report, and the reply thereto. A copy of said report and the reply thereto is hereby made a part of this petition."

This adopts the report of Mr. Kelley as true ; and Kelley says that in his judgment the plaintiff's signature to the receipt in question is genuine.

He says :

"*On the 3d September*, 1851, *Merritt enclosed to the Census office, from Santa Fé, New Mexico*, both of these accounts, with Gorman's signature to each of them. *That for the 'first half payment' was receipted in full*, and was a complete and perfect voucher in favor of the disbursing agent ; that for 'the second and last payment' *was receipted in blank*, but as the money to pay it had been sent out through Merritt, and as Gorman was presumed not to have affixed his signature without being paid, the blank was filled up in the Census office with the amount named in the body of the account, and credit given the disbursing agent accordingly.—(See copies 3 and 4 annexed.)

"After having carefully compared the signatures to these receipts with the signature of Gorman to an affidavit made by him on the 21st October, 1854, duly authenticated under seal of court, I have no hesitation in expressing the conviction that they are genuine, although

Mr. G. appears to have forgotten that he ever gave any other receipts than those which he himself subsequently sent directly to the Superintendent of the Census."—(Record, p. 18.)

Kelley was subsequently examined under oath, and testified that, from papers submitted to him in relation to this claim while he was disbursing agent for the Interior by Gorman's attorney, he had become acquainted with his signature, and that he believed that his signature to the receipt in question was genuine and in his own proper handwriting.

LEGAL PROPOSITIONS.

FIRST. *The plaintiff's signature to the receipt is evidence of payment, and payment not being disproved, it is conclusive.*

That the plaintiff signed the receipt cannot now be subject of question. It is conceded, that under certain circumstances, a receipt may be explained away; still, the one in question is conclusive, because it has not been shown to be untrue in its statements or to be false in any respect. The attempt to do so has entirely failed. The plaintiff has not offered any legitimate evidence to show that he was not paid in conformity with the terms of the receipt itself. The statements made by Merritt to the plaintiff's witnesses are no evidence against the defendants. Although they might be good as between him and the plaintiff, they prove nothing against anybody else. His statements were not verified under oath, and he may have told an untruth for the very purpose of securing double pay to the plaintiff. All that these witnesses have sworn may be entirely true, and still the plaintiff may have received his full pay through Merritt. The plaintiff should have sworn Merritt, and proved by him, if he could, that he signed the receipt without being in fact paid; but he failed to do so. He has proved what Merritt said orally, while he (Merritt) said in writing and under oath in an *ex parte* affidavit exactly the reverse; and hence, on this inadmissible evidence, the case stands as it originally did—upon the receipt itself, which shows that the plaintiff has been fully paid.

Merritt's written and sworn statement is as good evidence as his oral statement for all purposes, and somewhat better. That statement shows that he took the receipt and draft to pay it to the plaintiff, and that the latter signed the receipt; and he offered him the money, but that the plaintiff told him to keep it for him, as he was keeping other money which he had left with him for that purpose; and that Merritt gave plaintiff his note for the amount, upon which the latter sued and recovered a judgment.

SECOND.—*The United States having once paid the amount of the present claim through the instrumentality of the plaintiff, the latter is estopped from claiming that they should pay a second time.*

The money to pay the plaintiff for his services was placed in the hands of Williamson to be disbursed. On the order of Superintendent Kennedy, Williamson sent the receipt to be signed, and a draft

to pay the same, on the 18th of April, 1851, by Merritt, the plaintiff being his assistant as marshal. The plaintiff signed the receipt, which was returned to Williamson, and was allowed to him in the settlement of his accounts; and thus the United States paid once. If the money was not paid over by Merritt to plaintiff, he should not have signed the receipt, and then Williamson would have been accountable for the money placed with him for disbursement; but by signing it he naturally created the belief that Williamson had actually paid him, and therefore the government admitted the payment by Williamson, because the plaintiff had provided him with evidence that he had done so. And it is not denied that Williamson acted in good faith and sent the money, and obtained the receipt and got it allowed in his accounts without suspecting that the plaintiff had not in fact received his pay. It was a year or more after the giving the receipt before the Census bureau was notified that plaintiff complained that he had not been paid.

From this it clearly appears that the plaintiff, by his acts, induced the United States to believe that he had been paid by Williamson, and therefore allowed Williamson the amount; and consequently, the plaintiff, by his own acts, is estopped from denying the payment as between him and the defendants.

THIRD.—*Merritt became the agent of the plaintiff, and in retaining the money in question he represented him, and therefore the latter cannot rightfully claim a second payment of the defendants.*

The plaintiff has shown that he received Merritt's note for the money in question. In his petition the plaintiff claims that he is not barred from his right to recover, "because said note was not given or received in payment or satisfaction of the claim of your petitioner against the United States, and no part of said note has ever been collected by your petitioner; and the said Charles H. Merritt, after due diligence to collect the money of him by your petitioner, has proved wholly insolvent and unable to pay any part of said note."—(Record, p. 4.)

The note referred to is set out in the record at page 39, and is dated January 14, 1852—some four or five months before the plaintiff notified *Mr. Kennedy that he had not been paid—and is for $1,351 .78, and must include much more than his claim for taking the census. The record at the same page shows that a judgment had been rendered on the note in a suit commenced after plaintiff had notified Mr. Kennedy that his money had not been paid, and an execution issued, and that in fact he had received and credited on the judgment $644, being more than the amount in question. This amount covered the $603 62 and interest, which Merritt alleges and the plaintiff proves to have been included in this note. After requesting Merritt to keep the money for him, and taking his note, and suing thereon, and obtaining judgment, and receiving more than the amount now claimed thereon, he cannot deny, in this suit, that Merritt was his

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* Mr. Kennedy notified by letter of January 31, A. D. 1852.

agent, and acted for him in keeping the money now claimed. He has his judgment for this same claim against Merritt, has collected near half of that judgment, and now seeks to obtain $603 62 of it from the United States. If they pay him, he may still enforce, if he has not done so already, his judgment against Merritt, and obtain it over again.

How can plaintiff deny that Merritt acted for him and in conformity with his wishes, when he signed the receipt and afterwards took his note for that and other amounts?

If he did not wish to release the government, he should not have signed the receipt. If he did not consent that Merritt should become his debtor instead of the United States, why did he take his note for the amount? If he had not recognized Merritt as his bailee keeping his funds, why did he let the matter rest from the signing of the receipt, in the spring of 1851, until the winter of 1852, and then take his note and include the amount? During all this long period he made no complaint, and it is too late to do so now.

Merritt was at no time the agent of the United States in this matter. He was not made so by law, nor was he in fact. Williamson was the sole agent of the United States at the time under the law (9 U. S. L., 432, § 21) for paying these expenses. His sending the receipt and draft by Merritt did not make the latter the agent of the government, even if he became the private agent of this disbursing officer. Williamson was not authorized by law to employ an agent. It follows that Merritt was not the agent of the United States, and they are not bound to make good any losses that the plaintiff may have sustained by his transactions with him. Williamson, their lawful agent, acted in good faith throughout, and so has the government. If Merritt cheated the plaintiff in this matter, it is a private affair between them, for which the defendants are not liable.

FOURTH.—*The plaintiff having shown that he has attached certain rights belonging to Merritt, he cannot recover anything, if the defendants were liable, until he shows their final application.*

The marshal returns, that on the 27th of March, 1854, he served the execution on five garnishees.—(Record, p. 39.)

In October of that year the clerk certifies that no further proceedings had then been had in the cause.—(Record, p. 39.)

It may well be that the whole judgment has through these levies been paid, or that it could have been collected. If so, the plaintiff was bound first to enforce his remedy under the execution.

Again: It appears that a portion of the compensation due for services of the plaintiff as assistant marshal was actually paid to him by Merrit. Ester was asked by the plaintiff the following question and gave the following answer:

Question 6. Do you know that any payment was made by Charles H. Merritt to John Gorman, and on what account?

Answer. Some small sums were paid on account of services rendered, during Merritt's absence to Washington city, by John Gorman.

The whole amount may be something like two hundred or two hundred and twenty-five dollars.—(Record, p. 7.)

The plaintiff made this proof, and therefore cannot dispute it. It shows that the plaintiff had received *two hundred or two hundred and twenty-five dollars of Merritt on account of taking the census, which would reduce the present claim to $378 26, which is all that, in any event, he would be justly entitled to. But it is clear that he is not entitled to recover any amount.

R. H. GILLETT,
Solicitor.

JUNE 23, 1859.

IN THE COURT OF CLAIMS.

APRIL 2, 1860.

JOHN GORMAN'S ADMINISTRATOR *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

The petitioner's intestate was an assistant marshal for taking the seventh census of the United States, in the county of Rio Ariba, New Mexico, and became entitled to the sum of $1,207 24, as compensation for his services in that character. On the 18th day of April, A. D. 1851, the sum of $603 62, one half thereof, was ordered to be paid to him; and on the 9th day of May, A. D. 1851, the sum of $603 62, the residue thereof, was ordered to be paid to him. (See letter of the superintendent to R. H. Williamson, of April 18, A. D. 1851, and letter of same to same, of May 9, A. D. 1851.)

Charles H. Merritt, the marshal of the Territory of New Mexico, was appointed by the Department of the Interior a disbursing agent to pay his assistants. On the 18th of April, A. D. 1851, the Superintendent of the Seventh Census placed in his hands for this purpose the sum of $4,730 80, with directions to pay the decedent the sum of $603 62, part thereof; and on the 3d of May, A. D. 1851, the Superintendent placed in his hands for this purpose the further sum of $1,833 77, with directions to pay the decedent the further sum of $603 62, part thereof; these two sums of $603 62 each constituting the entire amount then due the decedent as compensation for his services as assistant marshal.—(Letter of superintendent to Merritt, of April 18, A. D. 1851, and letter of same to same, of May 3, A. D. 1851.) Charles H. Merritt was, at the dates of those letters, in the city of Washington.

Subsequently Charles H. Merritt returned to the Census office a paper purporting to be the decedent's receipt for "final payment," under date of September 3, A. D. 1851; and on the receipt thereof, at the Census office, the decedent's account was balanced and closed.—Letter of Superintendent to decedent, of March 9, A. D. 1852.) The

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[a] This was for services rendered by Gorman to Merritt, not connected with this claim.

execution of the paper so returned to the Census office was denied by the decedent, in his lifetime.

The letter of the Superintendent to the decedent of March 9, A. D. 1852, was an answer to one from the latter to the former, of January 31, A. D. 1852. In the latter the decedent informed the Superintendent that C. H. Merritt had not paid him the amount which was due him.

On the 14th day of January, A. D. 1852, C. H. Merritt gave the decedent his promissory note for the sum of $1,351 78, payable one day after date, with ten *per centum* interest thereon from January 1, A. D. 1851, till paid. In this sum of $1,351 78, the two sums of $603 62 each, which had been placed in C. H. Merritt's hands to be paid to the petitioner, were included.

On the receipt of the Superintendent's letter of March 9, A. D. 1852, the decedent, by a letter in reply thereto, dated May 1, A. D. 1852, again complained that C. H. Merritt had paid him no part of his compensation, and requested that the amount due should be sent him by the department. In answer to this letter, the Superintendent, by a letter dated June 16, A. D. 1852, informed the decedent that his request could not then be complied with, but that he would eventually receive his pay.

In a letter to the Hon. John G. Miller, dated June 25, A. D. 1852, the Superintendent stated that immediate arrangements would be made to pay the decedent his compensation. Accordingly, in a letter dated June 28, A. D. 1852, the Superintendent forwarded to the decedent two receipts for first and second payments of $603 62 each, saying: "Should Mr. Merritt not have paid over to you, on the receipt of this letter, any portion of your pay, you will please sign the receipts and return them to this office, stating the fact. Upon their coming to hand, a draft will be forwarded to your address." These receipts were signed by the decedent and forwarded to the Census office. He also forwarded to that office an affidavit, dated August 31, A. D. 1852, to the effect that he had not, up to that time, received any portion of his pay from Merritt. After these papers were received at the Census office, the Superintendent, in a letter dated February 4, A. D. 1853, forwarded to the decedent a draft for $603 62, the amount of his "final payment," and said: "You having forwarded to this office an affidavit, under date August 31, 1852, to the effect that you had not, up to that time, received any portion of your pay from Mr. Merritt, he will be forthwith called upon to report on the matter, and you shall be further advised upon the receipt of his reply."

The decedent, in a letter to the Superintendent, dated March 27, A. D. 1853, acknowledged the receipt of the draft for $603 62, complained that the Superintendent had not fully complied with his promise, and requested immediate payment of the remaining half of his compensation.

The Superintendent, in a letter to Charles H. Merritt, dated March 9, A. D. 1852, enclosed a copy of the decedent's letter of the 31st of the preceeding January, and said: "Mr. Gorman complains to the department that you have paid him no portion of the amount,

$1,207 24, placed in your hands in April last to pay him for his services as assistant marshal.

"I have informed him of the action taken by the department, and trust that you will discharge the claim without further delay, or make satisfactory explanation.

C. H. Merritt, in reply to this letter of the Superintendent, alleged that he had paid the decedent one half of the amount which had been placed in his hands to be paid to him.

The Superintendent, in a letter dated June 29, A. D. 1852, requested C. H. Merritt to forward to him a full statement of all the payments made by him to his assistants. In a letter dated August 31, A. D. 1852, Merritt forwarded to the Superintendent the statement requested. In that statement he alleges that he had paid the decedent "first half, $603 62," and had some expectation of making an arrangement with him for the payment of the other half; but on the next day, (September 1, A. D. 1852,) he wrote to the Superintendent that he had not been able to effect the arrangement, and that the second half was due the decedent.

The Superintendent, in a communication to the Secretary of the Interior, dated February 8, A. D. 1853, stated that Charles C. Merritt acknowledged that he was indebted to the government in the sum of $1,502 30, and promised that if a bond should be sent him, payable to the United States on or before September 1, A. D. 1853, he would return it "with certified good security." The Superintendent added:

"I would therefore respectfully suggest that you take such action in the premises as, in your judgment, the interests of the government may call for.

"I would further remark that it is alleged in an affidavit received from Assistant Marshal Gorman, dated August 31, 1852, that he had up to that time received no portion of his pay from the census agent; but as Mr. Merritt contends that the first half ($603 62) has been paid the said assistant marshal, this matter is held in suspense, and it has not been deemed advisable to include the amount of this payment in the bond about being drawn to cover his indebtedness."

On the 12th day of June, A. D. 1852, a suit was instituted against C. H. Merritt, in the district court for the Territory of New Mexico, on the note given by him to the decedent, and at the March term of that court, A. D. 1853, a judgment was obtained thereon; and on the 18th day of March, A. D. 1854, an execution was issued on that judgment and a credit of $644 was endorsed on the execution. This credit was given for the $603 62 received by the decedent from the Superintendent for the "final payment."—(See the deposition of J. Houghton, who testifies directly to this fact.) No money was made upon the execution. Moreover, C. H. Merritt, soon after his return from Washington to New Mexico, became notoriously insolvent, and so continued till 1854, when he left New Mexico.—(See the depositions of Geo. H. Estes and J. Houghton.)

It is plain from the evidence in this case that C. H. Merritt did not pay any part of the sum of $1,207 24, which had been placed in his hands for the purpose, to the decedent. The principal evidence which has been offered of such a payment is the paper purporting to be a

receipt from the decedent to R. H. Williamson for the sum of $603 62, forwarded to the Census office under date of September 3, A. D. 1851. The genuineness of that paper is disputed by the petitioner, and was denied by the decedent, in his lifetime, under oath; but it is not material for us to determine whether its execution by the decedent has been proved. The evidence shows that in point of fact the money was not paid, and, unless the United States were misled by it to their prejudice, it cannot operate as a payment, or in any respect as a discharge of the United States from their obligation to the petitioner.—(Muldon *vs.* Whitlock, 1 Cowen R., 290, 308; Wyatt *vs.* The Marquis of Hertford, 3 East. R., 147.) It did not in any respect prejudice the United States. It could not prejudice them to reopen the decedent's account after it had been formally closed, when justice required its reopening and he demanded it. Nor was it any prejudice to the United States that R. H. Williamson was allowed a credit in his account for the amount of the receipt, because to enter it in that account at all was a mere formality; he was never in any way responsible for it. Moreover, it does not appear *when* Williamson's account was settled. Nor were the United States induced by the receipt to give up any security which they possessed or might have obtained. At an early period they were informed that their agent had failed to pay the money; and afterwards, even when they were seeking security for other demands against him, they declined to ask security for this.

Nor did the note given by C. H. Merritt to the deceased operate as an absolute payment of the amount due him by the United States. It would not have that effect unless it had been expressly so intended by the parties.—Peter *vs.* Beverly, 10 Peters R., 532, 568; 1 Smith's Lea. Cas., 5th Am. ed., 453, on top, Story on Agency, sec. 433.) It not only does not appear from the evidence that such was the intention of the parties, but the very opposite conclusion is justly deducible therefrom. The most that can be urged in favor of the United States is, that the note was accepted as a conditional payment of the debt due by them to the decedent, and that its acceptance imposed upon him the duty of using due diligence for the recovery of the money due upon it. But, without stopping to inquire how far this may be true, it is a sufficient answer to it that no question of diligence has been, or could have been, raised in this case, for the plain reason that Merrit, previous to the date of the note and from that time till after the return of the execution, was notoriously insolvent, and no diligence, therefore, could have been effectual.

Nor did the judgment obtained by the decedent against C. H. Merritt operate as an extinguishment of the debt due the deceased by the United States. There can be no doubt that the acceptance by a creditor of a judgment from his debtor is an extinguishment of a lower security or obligation for that debt.—(Green *vs.* Sarmiento, 1 Peters C. C. Rep., 74; Butler *vs.* Miller, 1 Denis R., 407.) But a judgment against a third person cannot be an obligation for the same debt, and the doctrine of extinguishment does not apply.—(United States *vs.* Lyman, 1 Mason R., 482, 505; Day *vs.* Leal, 14 Johns. R., 404; 1 Smith's Lea. Cas., 5th Am. ed., 461, on top.)

It is plain, we think, that the petitioner is entitled to relief. We

shall report to Congress a bill in his favor for the sum of *six hundred and three dollars and sixty-two cents*, with a *proviso* that the same shall not be paid him till he shall have filed with the Secretary of the Treasury an assignment to the United States of so much of the judgment obtained by his intestate against Charles H. Merritt, in the proceedings mentioned, as shall be nominally equivalent to the sum hereby awarded him.

IN THE COURT OF CLAIMS.

APRIL 2, 1860.

JOHN GORMAN *vs.* THE UNITED STATES.

LORING, J., dissenting.

I think the material facts in this case are, that the United States, without authority from the petitioner, delivered to Marshal Merritt the money due to the petitioner, to be paid to him upon his signing receipts therefor, which were to be sent to the Census bureau; that with a knowledge of this, the petitioner signed the receipts, which were sent to the bureau under date of September 9, 1851; that four months after this, to wit, January 14, 1852, he took the negotiable promissory note of Merritt for the amount he had received and other moneys, without having made any demand upon or application to the United States.

Upon these facts I think Mr. Gorman affirmed and adopted the action of the United States in delivering his money to Mr. Merritt, and took Mr. Merritt for his debtor instead of the United States, and discharged them; for the receipts were the petitioner's authority to the United States to charge the money to him and thereby balance and settle his account; and it was also his authority to the United States to credit Merritt with the amount, and thus settle his account with the United States. And the evidence shows that all this was done at the bureau upon the strength of the receipts.

Then, the fact that Gorman took Merritt's note, greatly increases the force of the receipts, and, taken with them, confirms, and I think concludes the fact, that Gorman took Merritt for his debtor instead of the United States. Gorman could collect his debt but of one, and was free to elect either. To one he gives a receipt in full; from the other he takes a note; now which he meant for his debtor seems to me fixed by the evidence as a matter of fact, and having made his election September 9, 1851, he was bound by it then and therefrom.

It was argued for the petitioner that the note was conditional, to be payment only if and when paid, so that it was taken and held as collateral to, or together with, the claim against the United States. Then why did Gorman give his receipts to the United States? This fact is inconsistent with the argument, and, I think, repels it.

It was also argued for the petitioner that "a receipt is not conclu-

sive, but may be explained, qualified, or contradicted." This is true as a legal proposition; but when the receipt here is inquired into, the evidence shows that the United States have paid every dollar and cent specified in the receipt, and that the petitioner knew this when he gave the receipt; and the case between the petitioner and the United States is not as to the fact of their payment, but only as to the *manner of it*. And as to that, the question is whether the receipt given with full knowledge of how the payment had been made, together with the note subsequently taken from Merritt, was an adoption and affirmation of that payment by the petitioner. For the reasons I have stated I think it was.

That Gorman knew when he sent his receipt to the United States that they had paid the money, is the legal inference from the receipts, and it is confirmed by the fact that he took a note for the money from Merritt, and in his letter to the bureau, dated Santa Fé, January 31, 1852, he expressly states that Merritt, when he came from Washington, informed him that he had received half of his pay, which is on the evidence the first half, or the very sum claimed now.

Mr. Gorman sent to the bureau his affidavit, dated *October* 21, 1854, that he had not signed the receipt. So far as appears, this assertion was first made then, for his letter of March 27, 1853, (p. 32,) makes no such assertion, but rather avoids making it; and the letter to him from his agent, J. Houghton, dated "*Washington, August* 3, 1852," and which the petitioner puts in evidence, states thus: "There was no receipt of yours filed in the office, therefore Mr. Merritt did not forward *the one you signed.*" The evidence, I think, fixes the fact that Gorman signed the receipt, when the only alternative is that Merritt forged it, of which there is no evidence whatever.

If Gorman, by his receipt and the note taken from Merritt, had adopted and affirmed the payment made to Merritt, and taken him as his debtor and discharged the United States, the subsequent undertaking by the Superintendent to pay him could not bind the United States, for no officer of the United States can bind them to pay their debts twice; besides, in his letter to the bureau, dated January 31, 1852, Mr. Gorman did not disclose to the bureau the fact that he had taken Merritt's note, and this fact was so material that an undertaking made in ignorance of it could not, I think, be available for any purpose.

I am of opinion the petitioner is not entitled to relief.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 252.

NEHEMIAH GARRISON, ASSIGNEE OF MOSES PERKINS.

[To accompany Bill H. R. C. C. No. 100.]

MAY 2, 1860.—Committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

NEHEMIAH GARRISON, ASSIGNEE OF MOSES PERKINS, *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Depositions and other documentary evidence in support of the claim, transmitted to the House of Representatives.
3. Claimant's brief.
4. United States solicitor's brief.
5. Opinion of the court ordering a bill to be reported, allowing claimant $750.
6. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, at Washington, this 1st day of May, A. D. 1860.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE COURT OF CLAIMS.

NEHEMIAH GARRISON, ASSIGNEE OF MOSES PERKINS, *vs.* THE UNITED STATES.

The petition of Nehemiah Garrison respectfully represents, that he is a citizen of the State of Georgia; that one Moses Perkins, also a citizen of said State, owned a plantation in the county of Cherokee, in said State; that in the year 1837 the commanding officer of the United States troops charged with the removal of the Cherokee Indians detached a company of mounted infantry, under Ezekiel Buffington, in command of troops regularly mustered into the service of the United States, under the command of General Wool, to be stationed at the plantation of the said Moses Perkins, where a fort called Buffington was established; that they occupied the said plantation and the tenements thereon in the month of October, 1837, and continued the occupancy thereof until the 3d of July, 1838, with the express understanding that all damages should be paid for; that great damage was done to his plantation by the cutting down, using and destroying the timber for the purpose of building barracks, pickets, and block-houses; that upon applying for payment to the paymaster, he was informed that there was no appropriation to pay for the same; that he presented his petition to the House of Representatives, 26th Congress, 1st session, when it was referred to the Committee of Claims, but no report was made thereon; that it was again referred to said committee on January 15, 1852, and on December 14, 1853, and at the last session of Congress was referred to this court.

Your petitioner claims the amount of $750, as per annexed account, certified to by Ezekiel Buffington, captain commanding at said fort, together with interest due thereon. Your petitioner is sole owner of said claim, the same having been assigned to him by said Moses Perkins, in the year 1838, for the consideration of ($750) seven hundred and fifty dollars. He therefore prays that a bill be reported in his favor for the said sum of $750, together with the interest due thereon.

P. PHILLIPS,
Solicitor for Petitioner.

The United States to Moses Perkins, for spoliations at Fort Buffington, Cherokee county, Georgia, Dr.

1838.—To timber for officers' and soldiers' barracks.....	$175	00
To timber for building stables for 103 horses.....	150	00
To timber for building three corn cribs.....	45	00
To timber for building two block-houses.....	100	00
To timber for building pickets.....	100	00

1858.—To timber for building forge.....	$30 00
To timber destroyed by the Indians while under guard.	100 00
To fuel for officers and soldiers from October 15, 1837, to July 3, 1838.....	50 00
	750 00

I certify, on honor, that I was stationed on Moses Perkins's land in Cherokee county, Georgia, with a company of mounted infantry at the fort above mentioned, and do believe that we damaged him, the said Perkins's land, seven hundred and fifty dollars, through the damage done by the destruction of his timber for public use.

Given under my hand August 20, 1838.

EZEKIEL BUFFINGTON,
Captain Commanding.

NEHEMIAH GARRISON, ASSIGNEE OF MOSES PERKINS, *vs.* THE UNITED STATES.

Interrogatories to be propounded to Ezekiel Buffington, a witness to be examined in behalf of the claimant.

Interrogatory 1. What is your name, age, occupation, place of residence for the last year? Are you in any degree related to claimant; and are you in any manner interested in the claim?

Interrogatory 2. Look at the certificate dated August 20, 1838, and state whether it was signed by you when the same purports to have been. The said certificate is annexed to this.

Interrogatory 3. Did you sign this certificate as a captain in the service of the United States, and does the account truly represent the amount of damages done to the premises belonging to Moses Perkins?

Interrogatory 4. State under whose orders you occupied the station known as Fort Buffington, and whether the charges in the account were reasonable in their amount, and were necessary for the army of the United States.

Interrogatory 4. Did you make any report of your proceedings at Fort Buffington? If yea, to whom?

Interrogatory 5. Do you know Major Wilbanks, John M. Mullins, Henson Bagwell, and Posey Maddox, whose certificates are written on the back of said paper? What has become of them?

Interrogatory 6. State fully the circumstance under which you took possession of Fort Buffington, how long you occupied it, and your action while there, so far as it concerns taking any of the property of said Perkins.

Interrogatory 7. If you know anything else to benefit the claimant, state the same as though particularly interrogated.

P. PHILLIPS,
Solicitor for Claimant.

By the United States.

1. Was your attention called at any time to the specific items in the plaintiff's account; and can you speak as to their value in detail?
2. Were you, as the officer in command, called on to have the damages done to plaintiff's property assessed?

DANIEL RATCLIFFE,
Assistant Solicitor of the Court of Claims.

The United States to Moses Perkins, for spoliations at Fort Buffington, Cherokee county, Georgia, Dr.

1838.—To timber for officers' and soldiers' barracks	$175	00
To timber for building stables for 103 horses.....	150	00
To timber for building three corn cribs.....	45	00
To timber for building two block-houses.....	100	00
To timber for building pickets.	100	00
To timber for building forge.....	30	00
To timber destroyed by the Indians while under guard	100	00
To fuel for officers and soldiers from October 15, 1837, to July 3, 1838.....	50	00
	750	00

I certify, on honor, that I was stationed on Moses Perkins's land, in Cherokee county, Georgia, with a company of mounted infantry, at the fort above mentioned, and do believe that we damaged his, the said Perkins, land seven hundred and fifty dollars, through the damage done by the destruction of his timber for public uses.

Given under my hand August 20, 1838.

EZEKIEL BUFFINGTON
Captain, commanding Georgia Soldiers.

GEORGIA, *Cherokee county:*

Personally came and appeared before me Major Wilbanks, John M. Mullins, and Henson Bagwell, who, after being duly sworn, on oath saith, that they were frequently at Fort Buffington while the United States troops were stationed at that place, and know that they were on the land of Moses Perkins, and believe that the amount claimed by him for damage done the land by the troops and Indians is reasonable.

MAJOR WILBANKS.
JOHN M. MULLINS.
his
HENSON + BAGWELL.
mark

Sworn to and subscribed before me this 31st day of December, 1838.
RANDOL McDONALD, *J. P.*

GEORGIA, *Cherokee county:*

I, Posey Maddox, clerk of the inferior court for said county, do hereby certify that Randol McDonald, whose name appears to the foregoing affidavit, was at the date of the same an acting justice of the peace, and that full faith ought to be had and given to his official acts as such.

Given under my hand and private seal, there being no seal of office provided, this the sixteenth day of July, 1839.
[L. S.]
POSEY MADDOX,
Clerk Inferior Court.

GEORGIA, *Cherokee county:*

I, Reuben F. Daniel, one of the justices of the inferior court for the county and State aforesaid, do hereby certify that Posey Maddox, whose name appears to the above certificate is clerk of the inferior court for said county, and that full faith and credit ought to be had and given to his attestation as such.

Given under my hand and seal this the sixteenth day of July, 1839.
[L. S.]
R. F. DANIEL,
Justice Inferior Court.

IN THE COURT OF CLAIMS.

NEHEMIAH GARRISON, ASSIGNEE OF MOSES PERKINS, *vs.* THE UNITED STATES.

STATE OF GEORGIA, } *ss:*
County of Hall, }

On this the sixteenth day of November, A. D. eighteen hundred and fifty-eight, I, E. M. Johnson, ordinary and ex-officio clerk of the court of ordinary within and for the county and State aforesaid, have caused Ezekiel Buffington, a resident of said county, to me well personally known, to come before me, and after being duly sworn true answers to make to certain interrogatories issued in the above-stated case, he, the said Ezekiel Buffington, deposes and answers as follows, to wit:

To the first direct interrogatory he answers, his name is Ezekiel Buffiington; he is about fifty-nine years of age, a farmer, and resides in Hall county, and has for a number of years. He is in no way related to claimant, and has no interest whatever in said claim.

To the second direct interrogatory he answers, he has examined the certificate attached to the interrogatories; it was signed by him, and at the time the same bears date.

To the third direct interrogatory he answers, he signed the same as a captain in the service of the United States, and that he did be-

lieve at the time that the account presented truly represented the damages done to the lands of Moses Perkins.

To the fourth direct interrogatory he answers, he was in command of a company of mounted volunteers stationed at New Echota, when he was directed by the commanding officer (General John E. Wool, as well as he now remembers) to remove his command to some place in the neighborhood of Canton to select a site and build a fort; that he marched accordingly, selected the site on the lands of Moses Perkins, and erected the fort thereon called Fort Buffington; that he believed the charges in said account for damages were reasonable and just, and that the same were necessary for the use of the United States.

To the second fourth direct interrogatory he answers that he made a report to the commanding officer at New Echota that he had selected a site and gone to work.

To the fifth direct interrogatory he answers that he knew Major Wilbanks, John M. Mullins, Henson Bagwell, and Posey Maddox; that Henson Bagwell now resides in this county, (Hall;) that he does not know what has become of the others except from report.

To the sixth direct interrogatory he answers that he has already stated in his answer to the first fourth interrogatory the circumstances of taking possession of Fort Buffington; that he occupied it with his troops from some time in October, 1837, (the precise date not now remembered, but believes to be about the 15th day,) until July 3, 1838, and that while there the troops used the timber of said Moses Perkins promiscuously, as if it belonged to the United States.

To the seventh direct interrogatory he answers, he knows nothing further to benefit the claimant without this: that the fort was occupied a part of the time by an additional company of infantry, and that he had as prisoners under his command, a portion of the time, about thirteen hundred Indians.

To the first cross-interrogatory, or interrogatory by the United States, he answers that his attention was called to the various items of the account before he gave the certificate, and that he certified to the same, considering it in detail, and believing it to be just.

To the second cross-interrogatory he answers that he was not called on, as the officer in command, to have the damages assessed, other than to assess and certify the same himself.

EZEKIEL BUFFINGTON.

Answered, sworn to, and subscribed, this 16th day of November, 1858, before me.

E. M. JOHNSON,
Ordinary and Ex-officio Clerk of the Court of Ordinary.

STATE OF GEORGIA,
County of Hall, } *ss:*

I, E. M. Johnson, ordinary and ex-officio clerk of the court of ordinary within and for the county and State aforesaid, do hereby certify that the above and foregoing answers of Ezekiel Buffington were taken by and before me on the day of the date thereof, and that said

Ezekiel Buffington, having been duly sworn, subscribed the same in my presence.

[L. S.] Given under my hand and seal of office, at my office in Gainesville, this 17th day of November, 1858.

E. M. JOHNSON,
Ordinary and Ex-officio Clerk of the Court of Ordinary.

IN THE UNITED STATES COURT OF CLAIMS.

NEHEMIAH GARRISON, LESSEE OF MOSES PERKINS, *vs.* THE UNITED STATES.

Interrogatories to be exhibited to John H. Wood and N. J. Perkins, of Cherokee county and State of Georgia, witnesses for the plaintiff in the above-stated case:

First interrogatory to John H. Wood. Look upon the account hereto attached in favor of Moses Perkins, for spoliation at Fort Buffington, in Cherokee county, Georgia, in the years 1837 and 1838, and say whether or not you think the account reasonable.

Second interrogatory. Are you acquainted with Captain Ezekiel Buffington? If so, look upon the certificate attached to the above-named account, and say whether or not the signature thereto, purporting to be Captain Buffington's, is genuine.

Third interrogatory. Did you or not belong to Captain Buffington's company at the time specified in said account? If so, state whether or not you held any office; if so, what office did you hold?

First interrogatory to Newton J. Perkins. State whether or not you were a member of Captain E. Buffington's company in the years 1837 and 1838; if so, state where said company was stationed at the time above specified.

Second interrogatory. Look upon the account hereto attached in favor of Moses Perkins against the United States for spoliation at Fort Buffington, and say whether or not said account is reasonable.

Third interrogatory. Were you acquainted with the handwriting of Captain Buffington? If so, state whether or not the signature to the certificate attached to said account, purporting to be Captain Ezekiel Buffington's, is genuine.

Fourth interrogatory. State if you know anything about Moses Perkins having transferred his claim to Nehemiah Garrison, whether or not it was for a valuable consideration, and whether or not the consideration has been paid; if so, how long since?

STATE OF GEORGIA, *Cherokee County, ss:*

On this eleventh day of February, A. D. one thousand eight hundred and fifty-seven, personally came John H. Wood and Newton J. Perkins, the witnesses within named, and after being first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witnesses; and the

answers thereto were written down by the commissioner in the presence of the witnesses, who then subscribed the deposition in the presence of the commissioners. The deposition of John H. Wood and N. J. Perkins, taken at the request of the claimant, to be used in an investigation of a claim against the United States now pending in the Court of Claims in the name of Nehemiah Garrison, lessee of Moses Perkins.

The notice to the adverse party being waived by the solicitor for the United States, and P. Philips, solicitor for claimant.

JAMES JORDAN,
Commissioner.

GEORGIA, *Cherokee County:*

To the foregoing interrogatories John H. Wood makes the following answers:

To the first interrogatory he answers that he believes the account mentioned in said interrogatory, for spoliations on the land of Moses Perkins, amounting to seven hundred and fifty dollars, is reasonable and just.

To second interrogatory he answers that he is well acquainted with the handwriting of Captain Ezekiel Buffington, and that the signature to the certificate attached to the above account purporting to be his is genuine.

To third interrogatory he answers that he was a member of Captain Buffington's company all the time they were stationed at Fort Buffington, Cherokee county, Georgia; that they remained at said place from the 15th day of October, 1837, until the next July, and that he held the office of quartermaster and commissary during all said time said company was stationed upon the land of Moses Perkins.

The witness states that his name is John H. Wood; he is deputy postmaster at Canton, Georgia; is about fifty-six years old; resided at Canton, Cherokee county, Georgia, for the last year; has no interest, either direct or indirect, in this claim, and is no ways related to the claimant. He further states that he knows of no other matter relating to the matter in question.

JOHN H. WOOD.

NEWTON J. PERKINS answers:

To the first interrogatory he answers that he was a member of Captain Ezekiel Buffington's company; that said company was stationed at Fort Buffington in Cherokee county, Georgia, on the land belonging to Moses Perkins, from the 15th day of October, 1837, until about the 3d day of the next July.

To second interrogatory, he answers that the account now shown him in favor of Moses Perkins against the United States, for spoliation of timber, &c., amounting to seven hundred and fifty dollars, is reasonable and just.

To third interrogatory he states that he has frequently seen Captain Buffington write, and from his knowledge of the handwriting of

fiCaptain Ezekiel Buffington he believes the handwriting to the certicate attached to said account purporting to be his is genuine.

To fourth interrogatory he answers that he was present when the trade was made between Moses Perkins and Nehemiah Garrison for the claim specified in said account; that the same was transferred to Nehemiah Garrison for a valuable consideration; that Moses Perkins has long since told witness that the same was fully paid.

Witness states that his name is Newton J. Perkins; his occupation a farmer; is in his forty-second year of age; is a resident of Cherokee county, Georgia, for the last twelve months; has no interest, either direct or indirect, in this claim; is the step-son of Moses Perkins, and is in no way related to Nehemiah Garrison.

He does not know anything more in relation to the claim in question.

NEWTON J. PERKINS.

GEORGIA, *Cherokee County:*

This indenture, made and entered into this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and thirty-seven, between Edward Pass, of the county of Cwoeeta and State aforesaid, of the one part, and Moses Perkins, of the county of Cherokee and State aforesaid, of the other part, witnesseth: That the said Edward Pass, for and in consideration of the sum of sixty dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and conveyed, and does by these presents grant, bargain, sell, and convey, all that tract or lot of land situate, lying, and being in the county of Cherokee, known by the number 933, (nine hundred and thirty-three,) in the third district of said county, containing forty acres, more or less, to have and to hold the said bargained premises unto him, the said Moses Perkins, his heirs and assigns, to his and their own proper use, benefit, and behoof forever in fee-simple; and the said Edward Pass, for himself, his heirs, executors, and administrators, the said bargained premises unto the said Moses Perkins, his heirs and assigns, will warrant and forever defend the right and title thereof against themselves and against the claim of all and of every other person or persons whatever.

In witness whereof, the said Edward Pass hath hereunto set his hand and seal the day and year above written.

EDWARD PASS. [L. S.]

Signed, sealed, and delivered in the presence of—
ISAAC MCCONNELL,
JAMES JORDAN,
Justices of the Peace.

GEORGIA, *Talbot County:*

This indenture, made and entered into on the twenty-ninth day of January, in the year of our Lord one thousand eight hundred and thirty-four, and in the fifty-eighth of the independence of the United States of America, between Simeon Mote, of the county Talbot, of the one part, and Moses Perkins, of the county of Cherokee, of the other part, and both of the State aforesaid, witnesseth: That the said Simeon Mote, for and in consideration of the sum of one hundred and twenty-four dollars to him in hand paid by the said Moses Perkins at or before the sealing and delivery of these presents, doth grant, bargain, sell, release, convey, and confirm unto the said Moses Perkins, his heirs and assigns, all that tract or parcel of land situate, lying, and being in the county of Cherokee, known and distinguished by lot number nine hundred and thirty-nine, in the third district and second section, containing forty acres, more or less, reserving to himself all the mowing privileges on said lot, to have and to hold, together with all and singular the rights, members, and appurtenances thereof whatsoever, to him, the said Moses Perkins, his heirs and assigns, to the only proper use, benefit, and behoof of the said Moses Perkins, his heirs and assigns forever; and the said Simeon Mote and his heirs the tract or lot of land and premises aforesaid, and every part thereof, unto the said Moses Perkins, his heirs and assigns, against him, the said Simeon Mote, and his heirs and all and every other person or persons whatsoever, shall and will warrant and forever defend by these presents the right and title thereof.

In witness whereof, the said Simeon Mote hath hereunto set his hand and seal on the day and year first above written.

SIMEON MOTE. [L. S.]

Signed, sealed, and delivered in presence of—
JOSEPH BUCHANAN,
GEORGE BUCHANAN,
Justices of the Peace.

GEORGIA, *Morgan County:*

This indenture, made and entered into this second day of July, one thousand eight hundred and thirty-eight, between Early W. Thracher, of the county and State aforesaid, of the one part, and Moses Perkins, of the State aforesaid and county of Cherokee, of the other part, witnesseth: That for and in consideration of the sum of one hundred and sixty dollars to him in hand paid, the receipt whereof is hereby acknowledged, hath granted, sold, and doth by these presents grant, sell, convey, and confirm, unto the said Moses Perkins, his heirs, executors, administrators, and assigns, all that tract or lot of land situate, lying, and being in the second section and third district, known by number nine hundred and forty, (940,) in Cherokee county, containing forty acres, more or less, to have and to hold the same,

with all and singular the rights, members, and appurtenances thereof whatsoever, unto the said Moses Perkins, his heirs and assigns, to his and their own proper use, benefit, and behoof forever in fee-simple; and said Early W. Thracher, for himself, his heirs, executors, administrators, and assigns, doth warrant and forever defend the right and title thereof unto the said Moses Perkins, his heirs and assigns, and against all and every other person or persons whatsoever.

The said Early W. Thracher doth hereunto set his hand and affix his seal the day and date above written.

EARLY THRACHER. [L. S.]

Signed, sealed, and delivered in the presence of—
DRURY J. BRADLEY,
DANIEL MAJOR,
Justices of the Peace.

GEORGIA, *Walton County:*

This indenture, made this sixteenth day of January, in the year of our Lord one thousand eight hundred and thirty seven, between William Palmer, of the county and State aforesaid, of the one part, and Moses Perkins, of the county of Cherokee and State aforesaid, of the other part, witnesseth: That the said William Palmer, for and in consideration of the sum of fifty dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and conveyed, and doth by these presents grant, bargain, sell, and convey, unto the said Moses Perkins, his heirs and assigns, all that tract or parcel of land situate, lying, and being in the third district of the second section of Cherokee county, known by lot No. 941, to have and to hold said tract or parcel of land unto him, the said Moses Perkins, his heirs and assigns, together with all and singular the rights, members, and appurtenances thereof to the same in any manner belonging, to his and their own proper use, benefit, and behoof forever, in fee-simple; and the said William Palmer, for himself, his heirs, executors, and administrators, the said bargained premises unto the said Moses Perkins, his heirs and assigns, will warrant and forever defend the right and title thereof against themselves and against the claim of all other persons whatsoever.

In witness whereof, the said William Palmer hath hereunto set his hand and seal the day and year above written.

WILLIAM PALMER. [L. S.]

Signed, sealed, and delivered in the presence of—
ELIJAH PALMER,
JOHN SUMMONOR,
Justices of the Peace.

GEORGIA, *Cherokee County*:

This indenture, made this the seventh day of January, in the year of our Lord one thousand eight hundred and thirty-seven, between Thomas Minyard, of the county of Hall and State aforesaid, of the one part, and Moses Perkins, of the county of Cherokee and State aforesaid, of the other part, witnesseth: That the said Thomas Minyard, for and in consideration of the sum of forty-five dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath bargained, sold, and conveyed, and by these presents doth bargain, sell, and convey, unto him, the said Moses Perkins, his heirs and assigns, all that lot or parcel of land situated, lying, and being in the county of Cherokee and State aforesaid, known by lot No. 1004, third district and second section, forty *ackerkers*, be the same more or less, to have and to hold the said lot of land unto him, the said Moses Perkins, his *ares* and assigns, in fee-simple forever, together with all and singular the rights, members, and appurtenances *tharuntoe* belonging or in anywise appertaining; and I, the said Thomas Minyard, for myself, my heirs, executors, and administrators, do forever warrant and defend the right and title of the *foresaid* tract of land to the said Moses Perkins, his heirs and assigns, against the claim of all persons whatever.

In testimony whereof, I have hereunto set my hand and seal this the seventh day of January, in the year of our Lord *ateen* hundred and thirty-seven.

THOMAS + (his mark) MINYARD. [L. S.]

Signed, sealed, and delivered in the presence of—
JOHN KIRKEE.
JOHN WHEELER.

GEORGIA, *Cherokee County*:

Personally came before me John Wheeler, and, after being duly sworn, deposeth and saith that he was a subscribing witness to the above deed, and that he saw John Kirkee sign the same as a witness.

JOHN WHEELER.

Signed and sworn to before me April 3, 1838.

WILLIAM WHELEKE,
Justice of the Peace.

GEORGIA, *Cherokee County*:

Whereas, in obedience to a writ of *fieri facias* issued out of the justices' court of the county of Henry at the suit of E. Brown against William F. Bowden, I, Samuel C. Candler, sheriff of the county aforesaid, did seize the lot hereinafter described as the property of said William F. Bowden, and after being duly and publicly advertised,

agreeable to law, did, on the 2d day of September, in the year eighteen hundred and thirty-four, at the place of public sales in said county of Cherokee, expose the same to public outcry, when, Moses Perkins being the highest bidder, the same was knocked off to him at the price or sum of thirty-one dollars and fifty cents: Now, this indenture, made this 27th day of October, in the year of our Lord one thousand eight hundred and thirty-four, and in the fifty-ninth year of the independence of the United States of America, between the said Samuel C. Candler, sheriff as aforesaid, of the one part, and the said Moses Perkins, of the other part, witnesseth: That the said Samuel C. Candler, sheriff as aforesaid, for and in consideration of the sum of thirty-one dollars and fifty cents to him in hand paid by the said Moses Perkins at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted and bargained and sold, and by these presents doth grant, bargain, and sell, so far as the office of sheriff authorizes him, unto the said Moses Perkins, his heirs and assigns, all that tract or lot of land known by the number one thousand and six, in the third district and second section of now Cherokee county, containing forty acres, more or less, together with all and singular the rights, members, and appurtenances thereof unto the said tract or lot of land being, belonging, or in anywise appertaining, and also all the estate, right, title, interest, property, claim, and demand of the said William F. Bowden, his heirs, &c., in law, equity, or otherwise, whatsoever of, in, or to the same, to have and to hold the said lot of land and premises, and every part thereof, unto the said Moses Perkins, his heirs and assigns, to the only proper use, benefit, and behoof of the said Moses Perkins, his heirs and assigns forever, in fee-simple, in as full and ample manner as the said William F. Bowden or his heirs and assigns did or might have held or enjoyed the same had it not been seized and sold under the execution aforesaid.

In witness whereof, the said Samuel C. Candler hath hereunto set his hand and affixed his seal the day and year first above written.

SAML. C. CANDLER, [L. S.]
Sheriff Cherokee County.

Signed, sealed, and delivered in the presence of—
M. J. CAMDEN.
D. H. BIRD.

GEORGIA, *Cherokee County:*

Personally appeared before me Daniel H. Bird, who, being duly sworn, deposeth and saith that he saw Samuel C. Candler subscribe his name to the within deed for the purposes therein mentioned, and that he saw M. J. Camden subscribe the same as a witness, and the deponent did so likewise.

D. H. BIRD.

Sworn to and subscribed before me this 29th October, 1834.
FELIX MOSS, *J. P.*

GEORGIA, *Cherokee County:*

This indenture, made and entered into the 25th day of May, in the year of our Lord one thousand eight hundred and forty-two, between Moses Perkins, of the one part, and Nehemiah Garrison, of the other part, both of the county and State aforesaid, witnesseth: That I, Moses Perkins, for and in consideration of the sum of two thousand dollars to me in hand paid at and before the signing, sealing, and delivering of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and conveyed, and doth by these presents grant, bargain, sell, and convey, unto the said Nehemiah Garrison, his heirs and assigns, six tracts or lots of land situate, lying, and being in the third district and second section of Cherokee county, containing forty acres each, be the same more or less, and known and distinguished in the plan of said district by numbers nine hundred and forty-one, nine hundred and forty, nine hundred and thirty-three, nine hundred and thirty-nine, one thousand and four, and one thousand and six, reserving to the grantee all mining privileges on lot number nine hundred and thirty-nine; to have and to hold all and singular the above-described tracts or lots of land unto the said Nehemiah Garrison, his heirs and assigns, to their own proper use, benefit, and behoof forever, in fee-simple; and I, the said Moses Perkins, the above bargained premises will warrant and forever defend the right and title of the same, and every part thereof, from myself, my heirs and assigns, and also from the claim of all and every other person or persons whatever.

In testimony whereof, I, the said Moses Perkins, have hereunto set my hand and affixed my seal the day and year above written.

MOSES PERKINS. [L. S.]

Signed, sealed, and delivered in the presence of—
WILLIAM HUBBARD,
TILMAN CHAMLEE, *J. G. C.*

STATE OF GEORGIA, *Cherokee County:*

I, Jasper L. Keith, clerk of the superior court within and for the State and county aforesaid, do hereby certify that the attached seven copy deeds of conveyance for lots of land Numbers 933, 939, 940, 941, 1004, and 1006, in the third district of the second section, executed to Moses Perkins for the several separate lots aforesaid, and the said several lots by a single deed to Nehemiah Garrison, are true and perfect copies of the same taken from the records of the clerk's office of the superior court of said county, which is the proper office for the records of land titles, the said lots being situate in said county of Cherokee, and that no adverse claim or record to the said lands appears in my office.

To certify which, I hereto subscribe my name officially, and affix [L. S.] the seal of my office, in Canton, this October 29, 1858.

J. L. KEITH,
Clerk of the Superior Court, Cherokee county, Georgia.

STATE OF GEORGIA, *Cherokee County:*

Before me, James R. Burns, a justice of the peace in and for said county, personally came John Wheeler, John W. Henson, W. W. Worley, N. J. Perkins, and Major Wilbanks, who, being duly sworn, deposeth and saith that they were well acquainted with the tract of land owned by and occupied by Moses Perkins in the third district of the second section of Cherokee county, Georgia; that said tract of land was composed of numbers 933, 940, 941, 939, 1004, and 1006; and that Fort Buffington, in the year 1837 and 1838, was built and situated upon said tract of land at that time owned and in the possession of the said Moses Perkins, and that the timber necessary for building said fort was taken off the said land of the said Moses Perkins.

JOHN WHEELER.
JOHN W. HENSON.
W. W. WORLEY.
N. J. PERKINS.
MAJOR WILBANKS.

Sworn to and subscribed before me this 25th day of October, 1858.

JAMES R. BURNS, *J. P.*

STATE OF GEORGIA, *Cherokee County:*

I, John B. Garrison, do hereby certify that James R. Burns, whose name appears to the within affidavit, is an acting justice of the peace in and for said county, being duly elected and qualified, and was at the time of signing the within, and full faith and credit ought to be allowed his official acts and doings.

Given under my hand and the seal of my office this October 29, 1858.

[L. S.]

JOHN B. GARRISON,
Deputy Clerk of the Superior Court, Cherokee county, Georgia.

STATE OF GEORGIA, *Cherokee County:*

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The memorial of the undersigned humbly showeth to your honorable bodies that during the year eighteen hundred and thirty-seven the commanding officer of the United States troops charged with the removal of the Cherokee Indians detached a company of mounted cavalry, commanded by Captain Ezekiel Buffington, to be stationed in the county of Cherokee, and some time in the month of October of the year aforesaid Captain Buffington pitched his quarters on the land and tenements of your memorialist, with the express understanding that all damages would be fairly settled for and paid for by department. Your memorialist further shows, that great damage was done to his land, by cutting and destroying the timber in building

barracks, pickets, block-houses, stables, corn and fodder houses, and other necessary buildings for the use of said company, and that they remained in the said barracks until early in the month of July, eighteen hundred and thirty-eight. Your memorialist, relying upon the government to indemnify him for such damage as had been done, demanded of the paymaster satisfaction for the same, when he was informed that such charges were not paid by him, &c. Now, your memorialist humbly prays your honorable bodies to take the subject into consideration, that such action may be had thereon as in your wisdom shall seem reasonable and just. As in duty bound, your memorialist will ever pray.

MOSES PERKINS.

TREASURY DEPARTMENT,
Second Auditor's Office, October 4, 1858.

SIR: In reply to yours of the 20th ultimo and of the 2d instant, I have to inform you that Captain Ezekiel Buffington, of the Georgia volunteers, (1836, '37, and '38,) *was* mustered into the service of the United States, and paid for his services by Paymaster Bennett.

Very respectfully, your obedient servant,

T. J. D. FULLER,
Auditor.

H. C. SPALDING, Esq.,
Present.

QUARTERMASTER GENERAL'S OFFICE,
Washington, September 23, 1858.

SIR: The case of Moses Perkins was referred here on the 18th day of January, 1839, by Hon. Joel R. Poinsett, Secretary of War, and on the same day returned to him, with a report that its payment was not warranted by any existing laws.

"In regard to its merits, there is nothing on file in this office throwing any light upon it in addition to the papers submitted by the claimant, which are herewith returned."

On the 5th of October, 1857, the following was endorsed on letter of Daniel Ratcliffe, esq., enclosing petition of N. Garrison, filed in Court of Claims, presenting account of Moses Perkins for spoliations at Fort Buffington, Cherokee county, Georgia, in 1838:

"There is nothing in this office on the subject of this claim. The charge is reasonable and should probably be paid, provided the land from which the timber was taken belonged to the claimant, and was not Indian land."

The foregoing is all the information on file in this office.

Very respectfully, your obedient servant,

E. F. SIBLEY,
Major and Quartermaster.

H. C. SPALDING, Esq.,
Agent in the claim of Moses Perkins,
Washington, D. C.

IN THE COURT OF CLAIMS.

NEHEMIAH GARRISON *vs.* UNITED STATES.

Interrogatories to be propounded to Newton J. Perkins and John B. Garrison:

Interrogatory 1. In your evidence heretofore given in this case you were asked: "State if you know anything about Moses Perkins having transferred his claim to Nehemiah Garrison, whether or not it was for a valuable consideration, and whether or not the consideration has been paid. If so, how long since?" To which you replied: "I was present when the trade was made between Moses Perkins and Nehemiah Garrison for the claim specified in said account; that the same was transferred to Nehemiah Garrison for a valuable consideration; that Moses Perkins has long since told witness that the same was fully paid." Be good enough now to state particularly what was the character of the consideration, whether it was money or other thing, the amount of it if in money, and the time when the assignment took place.

Interrogatory 2. State what you know of the assignment of this claim to Nehemiah Garrison, what time it was made, what was the character of the consideration, and its amount.

P. PHILLIPS,
Solicitor for Complainant.
DANIEL RATCLIFFE,
Assistant Solicitor of the Court of Claims.

IN THE COURT OF CLAIMS.

NEHEMIAH GARRISON *vs.* UNITED STATES.

CLERK'S OFFICE SUPERIOR COURT, CANTON,
Cherokee County, Georgia, March 12, 1860.

There being no commissioner of this court for the purpose of taking interrogatories, I, the undersigned, clerk of said court, have this day caused Newton J. Perkins and John B. Garrison, the witnesses named in the annexed interrogatories, who, after being duly sworn, make oath and say, in answer to said interrogatories, as follows:

1. Newton J. Perkins says: That he is the step-son of Moses Perkins, and that he was present with his step-father in the field building a rail fence, about the first of March, in the year eighteen hundred and thirty-eight, (1838,) when John B. Garrison, the son of plaintiff, Nehemiah Garrison, came to where they were at work in the field to confirm the contract for the purchase of the land about which they, the said plaintiff and said Moses Perkins, had been negotiating, being the same premises of which spoliations are claimed from the govern-

ment; and the said John B. Garrison then and there, as the agent of his father, accepted of the terms of the trade as proposed by said Moses Perkins, and as an inducement to make the purchase at the price agreed upon, the said Nehemiah Garrison was to have the benefit of the spoliations that might be allowed by the government, which was estimated then to be about five hundred dollars, at the time of making the trade, say March 1, 1838, the troops having taken possession of the fort about the first of October, eighteen hundred and thirty-seven; and the said Garrison was to have and receive, also, what additional damage that might accrue thereafter, then unknown, as the troops were still in fort, and continued there until about 1st July, 1838.

2. Witness further states that, in pursuance of the agreement made for the land and claim for spoliations, the said Nehemiah Garrison executed his promissory notes to Moses Perkins for two thousand dollars, and took from Perkins his obligation for titles of conveyance of the premises when the purchase money should be paid. Witness further states that the last note or instalment for the land and spoliations was paid about the year 1841 or 1842, and a deed was executed, pursuant to the contract and obligation, which, however, may not express any transfer of spoliations, but it was understood and agreed this should follow. The consideration for the land and spoliations was embraced in the same notes, and all have been paid off in money.

John B. Garrison, answering, says: That he was agent for his father, Nehemiah Garrison, the plaintiff, and confirmed the contract which was carried out for the purchase of the premises and spoliations thereon, purchased from Moses Perkins, and that the said Perkins agreed that he would take the sum of fifteen hundred dollars for the land alone, or two thousand dollars including the spoliation accrued up to the time of the trade, which was about the 1st of March, 1838, and the troops continued on the premises, and he was to have the damage for the remainder of the time they should stay, (then indefinite,) which ended about 1st July, 1838; and the purchase was concluded for the sum of two thousand dollars, as the purchase paid for the premises and claim that might be allowed for spoliations. The said Nehemiah Garrison executed his notes for the sum of two thousand dollars, in instalments, and all of them have been paid off and discharged in money, the last one of which was transferred and paid to the bearer; to the best of his recollection, it was in the hands of W. W. Smithwick when paid, about the year 1841 or 1842.

NEWTON J. PERKINS.
JOHN. B. GARRISON.

The foregoing depositions read to the witnesses, Newton J. Perkins and John B. Garrison, and sworn to and subscribed by them before me March 12, 1860.

J. H. WOOD, *J. P.*

I certify that the foregoing depositions were carefully read to the witnesses, who, with a full knowledge of the facts therein stated, after being duly sworn, subscribed the same in my presence before John H.

Wood, esq., a justice of the peace for said State and county, who is authorized by law to administer oaths and take depositions for general purposes.

To certify which I hereto subscribe my name and affix the seal of my office, in Canton, this 12th day of March, 1860.

[L. S.]

J. L. KEITH,
Clerk Superior Court, Cherokee Co., Geo.

Clerk's fee for taking depositions.....	$2 50
N. J. Perkins, witness, one day.....	75
J. B. Garrison, witness, one day.....	75
	4 00

IN THE COURT OF CLAIMS.

NEHEMIAH GARRISON *vs.* THE UNITED STATES.

Petitioner's Brief.

The premises of Moses Perkins were taken possession of by the United States, in 1838, by Captain Ezekiel Buffington, who says in his deposition, (p. 7 :)

"He was in command of a company of mounted volunteers, stationed at New Echota, when he was directed by the commanding officer, General John E. Wool, as well as he now remembers, to remove his command to some place in the neighborhood of Canton, to select a site, and build a fort; that he marched accordingly, *selected the site on the lands of Moses Perkins*, and erected the fort thereon called Fort Buffington;" that "the charges in the account for damages were reasonable and just, and that the same were necessary for the use of the United States."

He also states that he had made a report of these proceedings to the commanding officer at New Echota.

At page 8 he deposes that "his attention was called to the various items of the account before he gave the certificate, and that he certified to the same, considering it in detail, and believed it to be just."

The certificate referred to is to be found at page 6, and is dated August 20, 1838, certifying on honor that the troops of the United States were "stationed on *Moses Perkins's land*," and that the damage done on "Moses Perkins's land" was $750 by the "destruction of his timber for public uses."

The affidavits of Major Wilbanks, John M. Mullins, and Henson Bagwell, made on 31st December, 1838, and attached to the account, (p. 6,) are to the same effect.

The same facts are also sustained by the depositions of John H. Wood and Newton J. Perkins, (p. 10,) who were members of Captain Buffington's company at the time of the occupation of Perkins's land.

The assignment of the claim by Perkins to Garrison is proved by the

deposition of Newton J. Perkins, the step-son of Moses, at p. 10, who says that "he was present when the trade was made between Moses Perkins and Nehemiah Garrison for the claim specified in said account; that the same was transferred to Garrison for a valuable consideration; that Moses Perkins has long since told witness that the same was fully paid."

A deed from Perkins to Garrison for the premises on which the damage in question was committed is to be found at p. 15, dated 25th May, 1842.

The claim was referred by Mr. Poinsett, while Secretary of War, on the 18th of January, 1839, and was not paid by the quartermaster general, because "not warranted by existing laws." (p. 18.)

On the 23d of September, 1858, the quartermaster writes: "The charge is reasonable and should probably be paid, provided the land from which the lumber was taken belonged to the claimant and was not Indian land."

The evidence seems, therefore, to establish clearly:

1. That the damage was done to Moses Perkins's land by the use of it for the United States troops.

2. That the damage amounted to $750.

3. That the claim is now the property of Garrison, the petitioner.

4. Twenty years have elapsed since the first presentation of the claim, and the payment to indemnify the claimant should include interest.

P. PHILLIPS,
Solicitor for Petitioner.

JUNE 8, 1859.

IN THE UNITED STATES COURT OF CLAIMS.

NEHEMIAH GARRISON, ASSIGNEE OF MOSES PERKINS, *vs.* THE UNITED STATES.

Solicitor's Brief.

The petition of the plaintiff alleges that in the year 1837 General Wool was in command of the United States troops, charged with the removal of the Cherokee Indians; that Ezekiel Buffington was captain of a company of mounted infantry, and was detached to take station at the plantation of one Moses Perkins, where a fort called Buffington was established; that they occupied the said plantation and tenements from October, 1837, until the 3d of July, 1838; that timber for barracks, &c., was cut and taken for the public service, amounting to the value of seven hundred and fifty dollars. The United States object to this claim upon the following grounds:

1. It does not appear from the evidence that the commanding officer (General Wool) authorized the property charged for in the

petitioner's account to be taken and used. He alone had the power to bind the United States, being in command, as alleged in the petition.

2. It is not shown that Ezekiel Buffington was a captain in the service of the United States. He certifies himself to be so, but this is not proof of the fact. If his certificate were received by the court as evidence of that fact, still it does not appear that he had authority from his superior officer (General Wool) to take and appropriate the petitioner's property.

3. If Buffington was a captain in the service of the United States, his certificate would not be evidence of the fact, because it is not the best that the case is susceptible of, nor has said certificate been officially made.

4. The evidence is too general and indefinite to enable the court to say whether the acts charged are such as the United States are liable for. The witnesses do not state facts, but merely give their opinion as to the damage sustained by the petitioner. They do not say that the petitioner's property was taken.

5. It does not appear that the claim has been presented to the proper department (War) for settlement. This we think should be done by the petitioner before coming into this court for relief.

DANIEL RATCLIFFE,
Assistant Solicitor of the Court of Claims.

IN THE COURT OF CLAIMS.

MARCH 23, 1860.

NEHEMIAH GARRISON, ASSIGNEE OF MOSES PERKINS, *vs.* THE UNITED STATES.

LORING, J., read the opinion of the court.

In the year 1837 a company of mounted infantry, under the command of Captain Buffington, and in the service of the United States, entered on the plantation of Moses Perkins, in the county of Cherokee, in the State of Georgia, and erected a fort there, and occupied it until the 3d of July, 1838. The timber for the erection of the fort and its barracks, sheds, &c., and the wood used for fuel, were cut from the plantation, and for this and for the destruction of timber by Indians detained at the fort as prisoners, $750 are claimed according to the specification in the account annexed to the petition.

The evidence shows that Moses Perkins was in possession of the plantation at the time of the entry, &c., and such possession, coupled with the deeds of conveyance to him shown in the record, is sufficient evidence of his title; none other having been put in evidence by the United States. The evidence from the Treasury Department shows that Captain Buffington was in the service of the United States. His own deposition shows he was directed by the commanding officer

("General John E. Wool, as well as he now remembers,") to remove his command to some place in the neighborhood of Canton, to select a site and build a fort; that in the execution of these orders "he marched accordingly, selected the site on the lands of Moses Perkins, and erected the fort thereon called Fort Buffington." (p. 7, ans. 4.)

That he made a report to the commanding officer at New Echota, that he had selected a site and gone to work. (p. 7, ans. 2d and 4th.) That he occupied it with his troops from some time in October, 1837, ("the precise date not now remembered, but believes it to be about the 16th day,") until July 3, 1838, and that while there the troops used the timber of said Moses Perkins as if it belonged to the United States. (p. 8, ans. 4.)

That the fort was occupied a part of the time by an additional company of infantry, and that he had as prisoners under his command a portion of the time about thirteen hundred Indians. (p. 8.)

At the time of the transaction, August 20, 1838, Captain Buffington certified to the correctness of the account which the petitioner now claims, and in his deposition in this case, being asked on the part of the United States, 1st, was your attention called at any time to the specific items in the plaintiff's account, and can you speak as to their value in detail? (p. 5) he answered, "that his attention was called to the various items of the account before he gave the certificate, and that he certified to the same, considering it in detail and believing it to be just." (2, p. 8.)

The testimony of Captain Buffington is corroborated by that of John H. Wood, quartermaster at Fort Buffington, and of N. J. Perkins, a soldier there; these witnesses speak of matters within their personal knowledge, and there is no conflicting testimony. (Record, pp. 7, 8, 9, 10.) And the communication from the quartermaster general's office, Washington, September 23, 1858, states that "*the charge is reasonable.*"

The orders given to Captain Buffington authorized the entry on the land, the construction of the fort, &c., and the use of the timber for that purpose, and for fuel, and the manner of doing all this was committed to his discretion. His acts, therefore, in these matters are the acts of the United States.

The timber so cut and used was private property taken for public use, and the United States are bound to pay Moses Perkins for it at its fair value.

The testimony of Captain Buffington as to the items of the account, with the general affirmation of the account by the other witnesses, is evidence of the fact stated in the account that timber was destroyed by Indian prisoners. The United States carried and kept the Indians there, and it was their duty, therefore, so to keep them that they should not injure others; and on this obligation they are liable to repair the injury done by the Indians.

The witnesses concur in the statement that the amount claimed in the account (seven hundred and fifty dollars) is a reasonable charge, and the correctness of their estimate is admitted at the office of the quartermaster general.

We are of opinion that the evidence proves that the United States

were indebted, in the sum of seven hundred and fifty dollars, according to the specification in the account on record, to the petitioner, to Nehemiah Garrison, and that he legally assigned his claim to the petitioner, who is, according to his prayer, entitled to relief therefor.

A bill will be reported to Congress for the relief of Nehemiah Garrison in the sum of seven hundred and fifty dollars.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C.C. No. 253.

DANFORD MOTT.

[To accompany Bill H. R. C. C. No. 101.]

MAY 2, 1860—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled.

The Court of Claims respectfully presents the following documents as the report in the case of

DANFORD MOTT *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Statement of claimant's account and evidence in support of the same, transmitted to House of Representatives.
3. Claimant's brief.
4. United States solicitor's brief.
5. Opinion of the Court, allowing claimant $2,707 92.
6. Opinion of Judge Loring, dissenting.
7. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the [L. S.] seal of said court, at Washington, this first day of May, A. D. 1860.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

To the Court of Claims of the United States:

The petition of Danford Mott, of Alburg, in the county of Grand Isle, in the State of Vermont, humbly showeth: That before the seventh day of November, one thousand eight hundred and thirty-eight, he was duly appointed deputy collector of customs and inspector under Colonel Archibald W. Hyde, then collector of customs for the district

of Vermont, and for most of the time since has been such deputy collector and inspector; that in the latter part of the year 1837 the outbreak occurred which has been familiarly called *the patriot war*, in which great bodies of citizens within the limits of the province of Canada were arrayed in an organized opposition against the authorities of such province, and against the British troops then in said province; that great numbers of the citizens of the United States all along the frontier, from Detroit to and including the northern frontier of Vermont, not only sympathized with such patriots, but took active measures to aid them, and for that purpose organized secret societies called *hunters' lodges*, collected great quantities of arms and munitions of war; that in some instances they broke open the United States arsenals, pillaged ordnance, arms, and munitions, and appointed officers, and banded together to carry on military operations within said province of Canada; that after the passage of the act of Congress called the neutrality act, approved March 10, 1838, and under the authority thereof, General Scott visited the northern frontier of the States of New York and Vermont, and your petitioner accompanied him, and lent all the aid in his power to preserve the public peace; that during the latter part of the year 1838 Mr. Van Buren issued his proclamation cautioning the citizens of the United States against illegal combinations in aid of the patriots, and warning them against all acts compromitting the peace of the government, and almost simultaneously the governor of Vermont issued a like proclamation; that, notwithstanding these precautionary measures, vast multitudes assembled on both sides of Lake Champlain, on the Canada frontier, and made active preparations for a descent into the province; that previous to the 1st of November, 1838, portions of the United States army were ordered out to the frontier, a detachment of which was then stationed at Rouse's Point, under the command of Colonel Justin Dimick, of the United States army, then a captain of artillery; that, in conformity to a requisition of the general government, a portion of the Vermont militia was ordered out, and placed under the command of General John E. Wool, of the United States army; that, by direction of General Wool, your petitioner accompanied him, giving him information of localities occupied by the patriots and their sympathizers, and where their arms and munitions were secreted in by-places, woods, and swamps, and assisted in seizing and securing the same, and returning some thirteen loads to the United States arsenals and barracks.

That on the 7th day of November, 1838, a battle was fought between a portion of the patriots and a detachment of the British troops, under the command of Sir John Coulbourne, the governor of Canada, at a place called Oldetown, adjoining the northern line of the State of New York, which resulted disastrously to the patriots, and they fled in great numbers across the line into Champlain, in which Rouse's Point is situated; that on the day and evening before a large quantity of arms and munitions had been collected in said Alburg, in Vermont, and put on board a sloop called the *General McComb*, for the purpose of aiding in such military enterprise in the province of Canada. and was about passing the frontier, and rounded to near Rouse's Point, and cast anchor near the wharf at Rouse's Point; that your petitioner

was then at or near the wharf, with his revenue boat and some men, and, at the request of Captain Dimick, went on board, in company with Thomas Crooke, then a deputy collector under D. B. McNeil, collector of customs for the northern district of New York; that, as they approached the vessel, the hands in charge suddenly left and abandoned it, and, going on board, they found it was loaded with a large quantity of arms and munitions of war, and with nothing else, and, leaving a guard on board, they returned and made report thereof to Captain Dimick; that subsequently the sloop was brought to shore by order of Captain Dimick, and the arms and munitions taken out and deposited in Captain Dimick's barracks; but as the particulars will be fully stated in the detail of the evidence on the final trial of the suit instituted against this petitioner, they are omitted here. The sloop was unloaded about sundown of the 7th November, 1838, but very soon after the wind arose and blew a perfect hurricane, and the sloop parted her cable, and was driven ashore and wrecked, without any want of care or negligence on the part of any of the seizing officers.

After the unloading, a consultation was had with the collector, McNeil, Captain Dimick, and Thomas Crooke, and, as the seizure was made in the district of New York, it was thought more appropriate that the application for a warrant of detention should be made to the district judge by the New York authorities, and Mr. Crooke made out an affidavit for that purpose, which, with an application for such warrant, was forwarded by Colonel McNeil, the collector, to Judge Conkling, but, by some miscarriage of the mail, Judge Conkling did not receive it until one day after the *ten days* specified in the said neutrality act had expired.

And your petitioner further shows that immediately after, one De Clancy Stoughton, claiming to be the owner of said sloop, commenced his action of trespass against this petitioner, declaring in two counts, the first alleging that this petitioner, on the 7th day of November, A. D. 1838, at said Alburg, to wit: at Champlain, with force and arms, seized, took, and conveyed away the plaintiff's sloop, called the General McComb, of the value of one thousand dollars, and converted the same to his own use, and in the second alleging that in like manner the petitioner seized, took, and carried away five hundred cannon balls, fourteen thousand cartridges, twenty thousand rifle balls, and twenty thousand grape shot, which said second count was subsequently withdrawn by the plaintiff, and the case proceeded on the count for seizing the sloop.

The writ was made returnable in the county court holden at North Hero, in the county of Grand Isle, Vermont, on the last Tuesday in March, A. D. 1839, and, under the rules of said court, was continued to the next term. Your petitioner engaged H. R. Beardsley, esq., of St. Albans, and Charles Adams, of Burlington, to aid in his defence, and by their advice the matter was represented to the proper department at Washington, and Hon. Daniel Kellogg, then district attorney, appeared and aided in the defence, and your petitioner supposes that said Kellogg made the necessary representation thereof to the Solicitor of the government at Washington. By the advice of Mr. Kellogg a

motion was made to dismiss the suit, on the ground that the State court had no jurisdiction of the matter, and at the term of the court in September, 1840, the suit was dismissed, but on exceptions being filed the cause was ordered to the supreme court, and that court, at the January term, 1841, reversed such judgment and ordered a new trial, and the cause again proceeded in said county court.

Your petitioner begs leave to say that it is utterly impossible to set out distinctly the difficulties he had to encounter *at that time*, arising from the intense prejudices of the great mass of the people in favor of the patriots, and against the officers of the general goverment, who were endeavoring to enforce the observance of the neutrality act. It is not too much to say that jury after jury disregarded entirely the evidence in the case, and in some instances the presiding judge did not escape the influence of this unbounded and unaccountable prejudice. Suffice it to say that the suit has passed four times to the supreme court, but received a final decision, so far as the original action was concerned, at the term of the supreme court in July, 1853, as may be seen by the learned opinion of Chief Justice Redfield, in the 25th Vermont Reports.

The last jury trial in said suit was had in the county court, in said Grand Isle county, in February, 1851. Colonel Dimick and Dr. Hitchcock were, by order of the government, in attendance as witnesses, and testified on the trial; and, that the Court of Claims may fully understand the whole case, the evidence detailed in the exceptions filed on that trial is now here fully set forth:

DE CLANCY STOUGHTON *vs.* DANFORD MOTT. } Grand Isle county court, February term, A. D. 1851.

This was an action of trespass with force and arms for seizing and carrying away the plaintiff's sloop, called the *General McComb*, on the seventh day of November, 1838. There was originally a second count for certain arms and munitions of war, which was subsequently withdrawn.

To this declaration the defendant pleaded three special pleas in bar, to which plaintiff replied, and tendered an issue to the jury, which was joined by the defendant and cause tried by the jury. The declaration, pleas, and replication are made parts of this case.

To prove the issue on his part, the plaintiff introduced as witnesses Francis N. Stoughton, L. D. Clark, Jos. Tillison, George Niles, Grant Rockwell, and Merritt Rockwell, who were sworn, and testified in substance as follows:

F. N. Stoughton.—I went down to the wharf after the sloop was unloaded, on the same night, and made demand of the sloop of those on board and in possession of her; I don't know who put the soldiers on board, but there were soldiers on board the sloop and on the wharf; I can't say whether they had any arms or not; it was then nearly dark; I saw Mott about a month afterwards, and, in conversation with him, he said if I would call on Thurber for the sloop he would give it up to me; that he was acting under Thurber; when I was on the wharf and made the demand of the sloop, I told them she

would go ashore and be destroyed, and they said they would take care of her; Captain Dimick said the boat was seized and I could not have her; I might stay on board as a prisoner, he said, but I told him I would have nothing to do with her on such terms; I am a brother of the plaintiff, and had the command of the sloop for him, and was his agent when she was taken.

On *cross-examination*, he said the sloop was unloaded about five o'clock; might have been about an hour unloading; vessel lay on the south side of the wharf; that he did not see Mott there to recognize him, and don't know as he was there; that he would not say of whom he made the demand; thinks he demanded it of Captain Dimick and of those on board of her; Thurber was collector at Champlain; this was in the fall of 1838; there was one good dock and two temporary docks; could not say at which dock the sloop lay; in the evening there was a tremendous sea. In answer to a question as to the value of the boat when taken, the witness said he had offered plaintiff four hundred dollars for her and he would not take it. The witness further testified that he did not aid in fastening the sloop after she was unloaded, nor had anything to do about it, or about removing her from the place where she was laying when unloaded.

L. D. Clark.—I went round with the sloop the evening before; started to go to Windmill Point and saw the revenue boat going out to the sloop with Mott in the boat steering, and some soldiers on board; this was in the afternoon; I afterwards went down to the dock after the boat was unloaded, and some of the soldiers, as appeared to me, were on board the sloop; Stoughton went on board to get his Buffalo skin, but could not get it; soldiers were on board after the sloop was unloaded; Stoughton was not permitted to get his things; it strikes me there was a guard on the dock, but am not certain; next morning the sloop was ashore on her beam's end, a wreck; I did not go on board; I called the boat worth five or six hundred dollars; she had two cables.

On *cross-examination*.—I cast anchor about twelve o'clock; revenue boat reached there about half an hour after; I did not see but one boat go out to the sloop, and think the sloop was brought directly ashore; did not see a second boat go out; after the vessel was brought ashore, did not see her till evening; I went down in the edge of the evening; did not see Mott after I saw him in the revenue boat; I cannot tell what Stoughton demanded; the vessel was moored to the south side of the wharf when she was unloaded and the arms taken out; I don't know that the vessel was moved round before she went ashore and became a wreck; I did not see her ashore till next morning; the wind increased during the night; part of the loading was on the dock when I went there, the rest having been drawn away, as I supposed.

Jos. Tillison.—I got to Windmill Point during the battle; when I went by the stern of the sloop I saw the revenue boat come up; Mott was in the revenue boat with soldiers; I think the revenue boat, after the men had gone on board the sloop, went back to the shore, leaving the men on board the sloop, and I think went out again; I went down to the wharf just at dark; there was some stuff on the wharf; I

stepped on board the sloop, and Mott, the defendant, was on board and told me I had better go off, and I did; they were then unloading the sloop.

On *cross-examination*, witness said: I can't say how long it was before the revenue boat came ashore; I think a second boat went out; I was then at Lewis's tavern, some fifty rods off; between sundown and dark I went down to the dock, and they were then unloading; I stepped on board and saw Mott there; soldiers were then on board; I did not see any sword and did not have any conversation; I think Mott's words were, "*there is no place here for strangers;*" I can't say whether Mott went out in the second boat or not; I had been before this time well acquainted with Mott.

George Niles said he was there in the afternoon when the sloop lay at the wharf; that he saw Mott and soldiers there, and heard Mott converse with Philips; Mott said he had no authority to give up any thing; that he was acting under another man.

On *cross-examination*, said that he did not know whether they were then unloading or not; that he was there from five to ten minutes; does not recollect of seeing any munitions of war on the dock; thinks there were soldiers on the boat, and there were a great many folks all about; don't recollect any one there but Mott; don't remember whether he had anything in his hand or not; this was along in the afternoon.

Grant Rockwell.—I came out of St. Johns river the day the battle was fought; I went to the sloop when she lay at the dock; a little after dark the same evening she was brought to the dock; cannot say whether there was then any loading on board or not; soldiers were then on board, but I saw no one unloading; Frank Stoughton, the captain of the sloop, was on board; he remarked that the boat should be made fast; soldiers were then on board the sloop; a load of guns was drawn off just as I got there; Frank spoke about getting out another fast, and some one on board said, "*we will take care of her.*"

On *cross-examination*, said he thought it was a load of guns they were drawing off; he went on board alone; Stoughton, the captain, was there on the sloop; he went into the cabin; don't know the man he talked with; don't know Captain Dimick; thinks the sloop was then fastened to the northeast corner of the dock, and tailed out; there was a hawser and a chain cable; I took another turn around the stile; Frank was then there; I saw no one loading aboard the sloop while I was there.

Merritt Rockwell said about a month or six weeks after the seizure, he had a talk with Mott, and he said he would bet a hundred dollars that the owner would get her if he would call on Thurber.

The foregoing is the substance of all the testimony on the part of the plaintiff in the opening.

To rebut this testimony, the defendant offered—

Ezra T. Marney, who stated that he lived near the wharf when the sloop was brought there, and the arms and munitions taken out; Captain Dimick was on the wharf, and his men did most of the unloading; at the request of Captain Dimick, he drew off, as he thinks,

four loads of ammunition and placed it in the barracks; that one Stratton was there also, and that he and Stratton drew off all the loading; when I drew off the last load, which was about sundown, Captain Dimick inquired for the captain of the sloop, and Frank Stoughton said he was the captain; Dimick then said, either take command of the sloop or take charge of her, I can't say which; when I drew off the last load I forgot my whip, and in a few minutes went back after it, and saw Stoughton getting his vessel round from the front of the dock to the north side; at the time the sloop was unloaded there were a great many people on the dock; I did not see Mott there, and think he could not have been there; I am well acquainted with him; it was about sundown when the vessel was unloaded; at this time the wind was blowing a little from the south, but in the evening it rose and blew like a hurricane.

Orrin Stratton, who stated that he was at the wharf after the sloop was brought there; that at the request of Dr. Hitchcock he took his team, and, with Marney, drew up the loading from the wharf and placed it in the barracks; Captain Dimick and Dr. Hitchcock were both there, and directed about the unloading, and had soldiers under their directions aiding in unloading; there were a great many people on the wharf; witness was well acquainted with Mott, but did not see him there.

Justin Dimick stated that he was at that time stationed at the post at Champlain and had the command there; that, on the day of the battle, from intimations given him, he requested Danford Mott and Thomas Crooke to go out and make an examination, which they did, and soon after returned and made report to him of the loading and condition of the sloop; he then requested them to go out and bring the sloop ashore, but Mott said as he was collector on the Vermont side, and Crooke collector on the New York side, it was more appropriately the business of Crooke, and declined going out; that he ordered Dr. Hitchcock, who was the surgeon attached to his detachment, to go out with some men and seize the vessel and bring her ashore; that Dr. Hitchcock and some soldiers under his command went out and brought the sloop to the wharf, and that he took charge of her, and directed the arms and munitions to be taken out, which was done and placed in his barracks; that he directed Dr. Hitchcock to take an inventory of the same, which was done, and that he and the doctor superintended the unloading and took charge of the same; that Mott was not there at all to his knowledge, and had nothing to do with it; that his soldiers were there and aided in the unloading, and that there were besides many persons on the wharf; that about the time they finished unloading he inquired for the captain of the sloop, and that a young man appeared and said he was the captain, and he then said to him that he was more interested in the sloop than any one else, and requested him to see that the vessel was secured, and offered him such assistance as he needed; the captain muttered something in reply, but the witness could not state what it was, but the witness stated that he did not intend to give up the possession or control of the sloop to the captain, as he supposed it was forfeited to the United States, and that it should be detained to await proceedings in the United

States courts; that his only object was to request the captain to aid in securing the vessel, as he supposed he understood it better than he did, and that the sloop was left that night in charge of a sentinel of soldiers.

On *cross-examination* Colonel Dimick said that he did not recollect whether any soldiers went out at the time Mott and Crook did or not, but they might have gone out; that soon after the seizure there was some conversation between him and Colonel McNeil and Mr. Crooke about an application to the district judge for a warrant of detention, and they seemed to think that the seizure was made by them, and the witness was willing they should assume it, and Crooke made out an affidavit for that pupose, and the witness understood that an application was made to the district judge for that purpose.

Charles M. Hitchcock stated that he was a surgeon, attached to the army of the United States, and was at Rouse's Point on the day of the battle; that Captain Justin Dimick, then in command of the post at Champlain, directed him to take some soldiers and go out and take the sloop then at anchor; that he took a sergeant's guard and went out to the sloop, raised the anchor and made sail, and brought the sloop to the south side of the wharf; that Captain Dimick then assumed the command, and directed the soldiers to take out the loading, which was done, and that he took an inventory of the articles as they were brought from the sloop and put on the dock; that he and Captain Dimick hired two teams, which took the loading and placed it in the barracks; that Mott did not go out with him, and so far as he knows, was not there when the loading was taken out, and had nothing to do with the taking or unloading; that at the time of the unloading there was a light wind, but it soon increased and blew very hard, and the vessel went ashore; that he was well acquainted with Mott, and thinks he could not have been there.

James W. Sunderland went down to the wharf at the time the sloop was partially unloaded; there were a good many people around; did not see anything of Mott; I am well acquainted with him, having known him a long time. I recollect hearing Captain Dimick inquire for the Captain of the sloop, and heard Stoughton answer the call. Stoughton said something, but in the confusion I cannot tell what it was. Stoughton went on board soon after, but I don't know what he did, or that he did anything, but I know the vessel was moved round to the northeast corner of the dock by some one. In the evening the wind rose and blew a perfect gale. I do not know at what time the vessel went ashore, but in the morning she was ashore, a wreck.

Benj. F. Wood was there on the day of the battle, and went on board of the sloop with Philips when he went out, and the sloop was brought ashore. Captain Dimick was there giving orders; directed Dr. Hitchcock to take charge, and went off to get teams. Mott was not in the boat with us, and I saw nothing of him at the sloop; I am well acquainted with him. When Philips and myself went out to the sloop while at anchor in the stream, soldiers were there in possession of her.

This is the substance of all the testimony on the part of the defendant.

In reply, the plaintiff placed Giles Harrington on the stand, who was sworn, and testified in substance that he saw the revenue boat going out to the sloop while at anchor, and that he saw the defendant Mott on board with soldiers in the boat as it was going to the sloop.

"The defendant submitted the following propositions to the court:

(These propositions, the decision of the court therein, and the charge of the court to the jury, inasmuch as they throw no light on the facts of the case, are omitted from the copy of the exceptions.)

"The jury found the issue for the plaintiff, and returned their verdict for the plaintiff to recover of the defendant damages and his cost.

"The foregoing exceptions are allowed, the execution stayed, and the cause is ordered to the supreme sourt.

MILO L. BENNETT,
Chief Judge."

And your petitioner further shows that the said cause was entered on the docket of the supreme court, and was twice argued in said court, to wit: at the January term, 1852, and at the January term, 1853, and was held for advisement until the special term of said court, held at Burlington in July, 1853, when, as before stated, it was solemnly decided by said court, which decision was pronounced by Chief Justice Redfield, and is reported in the 25th volume of Vermont Reports. The petitioner asks leave to place in his petition a few extracts from the learned opinion of the Chief Justice, as showing most clearly the opinion of that court, the illegality of the claim of the said Stoughton, and the justifiable conduct of this petitioner.

"DE CLANCY STOUGHTON
vs.
"DANFORD MOTT. } Supreme Court, June Term, 1853.

"This was an action of trespass to recover the value of the plaintiff's sloop, wrecked in a gale on Lake Champlain, under the following circumstances: As long ago as 1838, there was an insurrection of the French and some other portions of the inhabitants of Canada. The United States Congress passed an act entitled the neutrality law, by which our citizens were prohibited from aiding, or in any way giving countenance or support to the insurgents, and declaring forfeited all arms and munitions of war about to be transported from the territories of the United States into the Canadas, and the vessels in which the same were transported, if done in violation of the statute.

"In the present case the defendant justified the seizure of the munitions of war, as forfeited under the act of Congress, and the detaining the vessel for the purpose of unloading the munitions of war. The plaintiff replied that defendant had detained the vessel thence hitherto *and converted the same to his own use*, and this was traversed and tried by the jury.

"REDFIELD, *C. J.*—The first report of this case is found in 13 Vt., and decides, first, the liability of the vessel to be seized, and that it

may be detained ten days without warrant, but if detained longer, the detention becomes unlawful, and the party may seek redress in the State courts. But it says expressly, whether the remedy should be sought by trespass or trover, is a question relating to the form of action, but cannot affect the jurisdiction of the State courts, (which was the only question then before the court,) and, therefore, the propriety of the form of action was purposely left undecided.

"This case is next reported in 15 Vt. It is there decided that the frontier is a belt of country adjacent to the actual boundary. * * But the important point of this decision is, that the vessel is liable to seizure without reference to the actual purpose of passing the frontier, provided the officers 'had probable cause to believe, and did believe, either from the character of the vessel, or the quantity of arms and munitions on board, or other circumstances, that either the vessel or the munitions of war, either by the owner, or any other person with his privity, were to be used in carrying on any military expedition or operations within the territory of a foreign power.' * * * And there certainly was slight evidence at the trial of any want of ordinary care, even in those who had the custody of the boat. They might be, and probably were, deficient in skill, but under the circumstances of an almost actual conflict between the soldiery and citizens, in order to preserve the good faith of the nation towards a foreign power with whom we were at peace; and when citizens were in a state of actual armed rebellion, and the plaintiff's vessel engaged in this resistance to the laws, and arrested in the very consummation of its contemplated violation of our national neutrality and good faith, it would savor of offensive refinement to require of the persons having the custody of the vessel, any prescribed legal measure of any nautical skill in managing craft thus thrust upon them in the attempted execution of the laws of the country. If they did as well as they knew how to do, it is all which could be required. * * * * So that in every view of the defendant's conduct, on the evidence detailed in the exceptions, it seems impossible to implicate the defendant beyond his mere agency in seizing and unloading the arms and munitions of war, which were expressly forfeited by the act of Congress, and which, of course, under the circumstances, it was made the imperious duty of the defendant to seize and detain, and which, to have evaded at the time, would have been justly regarded not only a dereliction of duty, at all times disgraceful, but in that particular emergency a cowardly and dastardly instance of treachery and self-seeking at the expense of his official oath and obligation, which all fair minded men would not fail to regard as far more disastrous than any pecuniary loss or embarrassment which could possibly fall upon him, and more to be deprecated by an honorable mind than even the loss of life, in the reasonable and prudent defence of one's country or its laws. And lastly, these very munitions of war, which, in the first instance, were included in this suit, are now abandoned by the plaintiff himself as a hopeless pursuit, thus virtually confessing that all which the defendant is shown to have done, was done with propriety, as a matter of duty and necessity.

"The judgment of the county court, being founded upon a verdict

against all the evidence, is reversed, and the same is remanded to the county court."

In conformity with the decision of the supreme court, the cause was remanded to the county court, and replaced on the docket of said court, and the petitioner flattered himself that, inasmuch as the highest court in the State had authoritatively adjudged on a full hearing of all the evidence that the plaintiff's claim was without any just foundation, the judgment of the supreme court would be respected, and a final judgment rendered for the petitioner, but an entirely new chapter of perplexities was soon opened. The said cause was reinstated on the docket at the August term of said court in 1853, and on the affidavit of the plaintiff continued to the next term of said court. In the meantime the legislature of Vermont assembled in October of that year, and *it so happened* that the leading attorney of said Stoughton was a member of that august body, and *it so happened* further that a law was passed by said legislature in the words and figures following:

"*It is hereby enacted by the general assembly of the State of Vermont, as follows:*

"SEC. 1. In any action of trespass, or trespass on the case, pending in any court in this State, the plaintiff shall be allowed to join in his declaration counts in both of the aforesaid forms of action for the same original cause.

"SEC. 2. This act shall take effect from its passage.

"Approved December 6, 1853."

At the succeeding term of the county court, the plaintiff asked leave to file three counts in *trespass on the case* for his said sloop, which was resisted on various grounds, that, by a fair construction, the act did not apply to any suit commenced before its enactment, and if it did, such construction would make it retroactive, and therefore void; but the court overruled the objections, and allowed the declaration in trover to be filed. To these new counts this defendant filed several pleas, and such proceedings were had thereon, that at the term of said court in August, 1856, a final judgment was rendered in said suit in favor of this petitioner.

And this petitioner further shows, that in defending said suit for the long period of seventeen years, he has been obliged to devote a large portion of his time, and expend large sums of money in procuring witnesses, paying their fees and expenses, and paying court and jury fees. The suit, as before stated, has been four times to the supreme court, and in that and the county court has been forty terms in court, and in one form or another has been tried twenty times. The successive administrations at Washington have kindly sent the successive district attorneys to aid in the defence. Hon. Daniel Kellogg, Hon. Abel Underwood, Charles Linsley, esq., and Lucius B. Peck, esq., have each been in attendance, and lent their aid; but still your petitioner thought it indispensable to employ other counsel, and for that purpose he employed H. R. Beardsley, of St. Albans, and Charles Adams, of Burlington, who have aided him through the whole time

the said suit has been in court, and to both these gentlemen he has, from time to time, paid fees amounting in all to a large sum of money. This petitioner's account for his cash expenditures and amount of time spent will accompany this petition, and to this he begs leave to refer.

This petitioner, supposing that the several district attorneys have, in their reports and correspondence, kept the government advised as to the history and progress of the cause, therefore, begs leave to refer to such correspondence, more particularly, as his excellency the President, at that time Secretary of State, by his letter of March 6, 1848, to Charles Linsley, particularly called the attention of that gentleman to that point, and to save time in referring to the files at Washington, this petitioner sets out a copy of that letter.

"DEPARTMENT OF STATE,

"*Washington, March* 6, 1848.

"SIR: Through the Hon. Mr. Marsh, of the House of Representatives, a request has been made to this department by Charles Adams, of Burlington, Vermont, for the services of the district attorney of Vermont, in the case of D. C. Stoughton against Danford Mott, which is now pending before the proper judicial tribunal in that State.

"The case arises out of a seizure made by Mott, when acting, as he alleges, as deputy of A. W. Hyde, esq., who was collector of the customs for the district of Vermont, and the vessel seized is said to have contained arms and munitions of war, which had been prepared for a military enterprise against the province of Canada.

"You will please ascertain and inform this department under what authority, the seizure was made, and whether the case requires, for any sufficient reason, the intervention at this time of the government of the United States.

"I am, very respectfully, your obedient servant,

"JAMES BUCHANAN.

"CHARLES LINSLEY, Esq.,

"*District Attorney, Middlebury, Vt.*"

In pursuance of this instruction, Mr. Linsley attended, and assisted in the defence, and this petitioner presumes duly advised the government in relation to the suit. After his term of office expired, Messrs. Underwood and Peck severally attended, of all which this petitioner presumes the government have been duly advised.

In conclusion, your petitioner begs leave to say, that during the perilous times of 1838–9, when misguided citizens gathered in throngs on our northern frontier, and were ready to precipitate themselves upon the province of Canada, thereby putting in jeopardy the peace and the honor of the nation, this petitioner did whatever he could to protect the one and defend the other, and at least has the satisfaction of feeling that he has done his duty as an officer of the government, and will not, in advance, allow a doubt to arise as to the readiness of the government to allow him a reasonable compensation for his great expenditures beyond any costs that can be taxed in the suit in his

favor, and for almost years of time in anxious defence against an illegal claim for having endeavored to do his duty as a faithful officer.

If it were necessary to refer the honorable Court of Claims to any legal ground on which this petitioner rests his claim, it is that of an implied contract on the part of the government to protect and indemnify their officers and servants while acting in the proper discharge of their duties as officers of the government. All which is submitted.

DANFORD MOTT.

BURLINGTON, VT., *December* 1857.

Sworn to.

Claims of Danford Mott, of Alburg, in the State of Vermont, for remuneration for time, trouble, and expenditures occasioned by the defence of the suit of Dr. Clancy Stoughton against the said Danford Mott for the seizure and detention of the sloop Gen. McComb, loaded with arms and munitions of war, in November, A. D. 1838, *under the law of Congress, commonly called the neutrality act, as follows:*

COUNTY COURT, APRIL TERM, 1839.

To attending said court three days.....	$7 50
To expenses for board while at court.....	2 75
To expenses for horse-keeping at court.....	1 25
To expenses for ferriages going and returning from court..	75

COUNTY COURT, SEPTEMBER TERM, 1839.

To two days going to Burlington to engage counsel and prepare said cause for trial.....	5 00
To expenses for board while at Burlington.....	2 00
To expenses for fare on board steamboat going and returning, fifty miles each way.....	4 00
To going to Plattsburg to see Thomas Crooke as witness in said cause, two days.....	5 00
To bill for board while at Plattsburg.....	1 75
To fare on board steamboat going to and returning from Plattsburgh, 25 miles each way.....	2 00
To one day at Rouse's Point, New York, procuring testimony in said cause.....	2 50
To expenses for two ferriages and two meals of victuals at Rouse's Point.....	75
To paid Thomas Crooke as witness, as per his debenture...	2 35
To paid George Mott as witness, as per his debenture.....	2 30
To paid Tabor Deuel as witness, as per his debenture.....	2 30
To paid M. T. Mott as witness, as per his debenture.....	2 15
To three days' attendance at said court.....	7 50
To paid bill for board while at court.....	2 75

To paid bill for horse-keeping while at court.....	$1 20
To paid for two subpœnas.....	50
To paid officer's fees for serving subpœnas.....	2 28

COUNTY COURT, MAY TERM, 1840.

To two days going to Burlington to see counsel and prepare cause for trial.....	5 00
To bill for board while at Burlington.....	2 00
To fare on steamboat going and returning.....	4 00
To three days spent in procuring testimony in said cause...	7 50
To expenses same time for self and horse..	3 50
To paid Thomas Crooke as witness in said cause, as per debenture.....	2 35
To paid Tabor Deuel as witness in said cause, as per debenture	2 10
To paid George Mott as witness in said cause, as per debenture	2 35
To paid M. T. Mott as witness in said cause, as per debenture	2 15
To Aaron Stratton and E. T. Marney, witnesses in said cause, whose residence was out of the State, and could not be reached by subpœna, one dollar per day, and expenses, by agreement, paid each of said witnesses for three days.....	6 00
To paid expenses of said witnesses while at court.....	4 25
To paid for carrying said witnesses, (A. Stratton and E. T. Marney,) to court and back, 17 miles.....	5 00
To three days for self, attending said court.....	7 50
To expenses for self and horse, while at court.....	3 75

COUNTY COURT, SEPTEMBER TERM, 1840.

To two days going to Burlington to see counsel and prepare cause for trial.....	5 00
To paid fare on steamboat going and returning.....	3 50
To bill for board while at Burlington.....	2 00
To one day at Port Kent and Plattsburg to see witnesses.	2 50
To expenses same time.....	1 00
To one day going to Missisquai Bay to see Levi Hinkley as witness in said cause.....	2 00
To expenses paid out for self and horse, same time.	1 25
To going to St. Alban's Bay, one and a half days, to procure testimony in said cause, (20 miles).....	3 75
To expenses for self and horse, same time.....	2 06
To paid for ferriages going and returning from St. Alban's Bay	1 00
To one day going to Caldwell Manor, Canada, to get testimony in said cause.....	2 50
To paid expenses same time.....	50

To going to Rouse's Point to engage witnesses in said cause, one day	$2 50
To expenses for self and horse, same time	75
To paid George Mott as witness in said cause, as per his debenture	3 10
To paid Tabor Deuel as witness in said cause, as per his debenture	2 85
To paid M. T. Mott as witness in said cause, as per his debenture	2 85
To paid George W. Ames as witness in said cause, as per his debenture	2 85
To paid John Wheeler as witness in said cause, as per his debenture	4 05
To paid E. T. Marney, Aaron Stratton, Ezra Thurber, D. B. McNeil, Thomas Crooke, and Levi Hinkley, witnesses in said cause, whose residence is out of the State, one dollar per day each, 4 days	24 00
To paid board of said six witnesses while at court, 3 days.	13 50
To paid for carrying A. Stratton E. T Marney, and Ezra Thurber to court	3 50
To cash paid for ferriage conveying said witnesses to court.	50
To paid expenses for team while at court, 3 days	2 25
To carrying the aforesaid witnesses home from court	4 00
To cash paid for ferriages returning from court	50
To cash paid clerk for court fees	1 19
To four days at court per self	10 00
To paid for board for self, while at court	3 75
To paid for ferriages for self and horse, going to and returning from court	75
To paid bill for horse-keeping while at court	1 50
To paid for one subpœna and service	55
To one day going to clerk's office to get cost tax.	2 50
To cash paid clerk for taxing costs	25
To paid out while going to clerk's office for ferriages and bill while there	1 50

SUPREME COURT, JANUARY TERM, 1841.

To attendance on said court two days	5 00
To bill for board while at court	2 00
To bill for horse-keping while at court	1 00

COUNTY COURT, MAY TERM, 1841.

To three days going to Burlington to see counsel and prepare said cause for trial	7 50
To paid bill for board while at Burlington, 2 days	2 00
To paid bill for horse-keeping while at Burlington	1 25
To paid expenses for self and horse while going to and returning from Burlington	1 86

To going to Missisquoi Bay to procure the testimony of Levi Hinkley in said cause, one and half day, 18 miles each way	$3 75
To paid expenses for self and horse, same time	2 15
To one day going to Champlain and Rouse's Point to engage witnesses in said cause	2 50
To paid ferriages going to and returning from R. Point	50
To paid for expenses for self and horse, same time	68
To two days going to Plattsburg to see Thomas Crooke and D. B. McNeil, to procure their testimony in said trial	5 00
To paid bill for board while in Plattsburg	1 50
To paid fare on steamboat going to and returning from Plattsburgh	2 00
To M. T. Mott, witness in said cause, as per debenture	2 15
To paid Geo. W. Ames, witness in said cause, as per debenture	2 10
To paid Geo. Mott, witness in said cause, as per debenture	2 35
To paid D. B. McNeil, Thomas Crooke, Ezra Thurber, Benjamin F. Wood, James McDougal, and Schuyler Randle, witnesses in said cause, who resided out of the State, two days' attendance each	12 00
To paid the aforesaid six witnesses for time going to and returning from court, two days each	12 00
To cash paid for carrying said witnesses to court, one dollar each, 17 miles	6 00
To paid bill for board of said witnesses while at court, two days each	9 00
To paid for carrying said witnesses home from court, one dollar each	6 00
To paid for ferriages going to and returning from court	2 70
To three days' attendance per self at court	7 50
To bill for board, same time	2 75
To bill for keeping horse, same time	1 50

SUPREME COURT, JANUARY TERM, 1842.

To attending said court threee days	7 50
To paid for board while at court	2 75
To paid for horse-keeping, same time	1 50

SUPREME COURT, JANUARY TERM, 1843.

To attendance on said court three days	7 50
To cash paid court and clerk fees	4 25
To paid for board while attending said court	2 25
To paid for horse-keeping, same time	1 50

COUNTY COURT, MAY TERM, 1843.

To going to Burlington to see counsel and prepare said cause for trial, three days	$7 50
To paid bill while at Burlington for self and horse	3 00
To paid expenses going to and returning from Burlington for self and horse	2 23
To one day going to St. Albans to see H. R. Beardsley, counsel in said cause, 20 miles each way	2 50
To paid expenses going to and returning from St. Albans.	1 25
To one day going to Rouse's Point, N. Y., to engage witnesses to attend said court	2 50
To paid for ferriages going and returning	50
To paid for expenses for self and horse same time	84
To one day going to Highgate to procure testimony in said cause, 17 miles each way	2 50
To paid for horse-hire and ferriages, same time	1 50
To paid Rufus Brayton, witness in said cause, as per his debenture	1 25
To paid Merit Rockwell, witness in said cause, as per his debenture	1 15
To paid Tabor Deuel, witness in said cause, as per his debenture	1 40
To paid Geo. Mott, as witness in said cause, residence in Bangor, N. Y., 80 miles from court	12 00
To paid Benjamin F. Wood, Aaron Stratton, Pearly Moore, and E. T. Marney, (residence out of the State,) witnesses in said cause, two days each	8 00
To paid for carrying said witnesses to court, 17 miles	7 00
To paid for board of said witnesses while at court, one day.	3 75
To paid for carrying said witnesses home	7 00
To paid expenses of said witnesses when going to and returning from court	1 86
To paid Thomas Crook, as witness in said cause, resident of Plattsburg, N. Y	2 00
To paid said Crook's expenses while at court	1 00
To paid clerk for court fees	3 46
To paid for subpœna and officer's service of same	1 76
To two days' attendance at court	5 00
To paid bill for board at court for self	1 75
To paid bill for horse-keeping same time	1 00
To paid for ferriages going to and returning from court	75

COUNTY COURT, SEPTEMBER TERM, 1843.

To two days going to Burlington to see counsel and prepare said cause for trial	5 00
To paid steamboat fare going to Burlington, 50 miles	1 75
To paid bill for board while in Burlington	1 50
To paid steamboat fare returning from Burlington	1 75

To two days going to St. John's to see Mrs. Morehouse, a witness in said cause	$5 00
To paid steamboat fare going to St. John's, 25 miles	1 00.
To paid expenses while at St. John's	1 12
To paid steamboat fare returning from St. John's	1 00
To two days at Rouse's Point, N. Y., engaging witnesses to attend court	5 00
To paid for expenses while there	1 50
To paid for ferriages going to and returning from Rouse's Point for self and horse	75
To paid Tabor Deuel, as witness in said cause, as per debenture	1 40
To paid Rufus Brayton, as witness in said cause	1 25
To paid George Mott, as witness in said cause, a resident of Bangor, N. Y., 80 miles distant from said court	12 00
To paid Thomas Crook, as witness in said cause, a resident of Plattsburg, N. Y., 20 miles distant from court	5 00
To paid B. F. Wood, Aaron Stratton, E. T. Marney, and James McDougal, as witnesses in said cause, residence at Rouse's Point, N. Y., one dollar per day each, two days	8 00
To paid for carrying said witnesses to court, 20 miles	6 00
To paid for said witnesses' board while at court, one day	3 00
To paid for carrying said witnesses from court to Rouse's Point	6 00
To paid expenses of said witnesses while going to and returning from court	2 38
To paid ferriages going to and returning from court	1 25
To paid clerk for jury fees, continuance, and recognizance.	6 30
To two days' attendance at court per self	5 00
To paid for board for self, same time	1 75
To paid for horse-keeping, same time	87
To paid for ferriages for self and horse going to and returning from court	75

COUNTY COURT, MAY TERM, 1844.

To three days going to Burlington to see counsel and prepare said cause for trial	7 50
To bill for board while at Burlington	2 50
To paid for horse-keeping while at Burlington	1 75
To paid for expenses for self and horse while going to and returning from Burlington, 50 miles	2 43
To two days going to St. John's to see Mrs. Morehouse, a witness in said cause	5 00
To paid steamboat fare going to and returning from St. John's, same time	2 00
To paid expenses while at St. John's, same time	1 25
To two days going to Plattsburg to see Thomas Crook, a witness in said cause	5 00

To paid steamboat fare going to and returning from Plattsburg, same time, 25 miles each way	$2 00
To paid expenses while at Plattsburg, same time	1 38
To two days at Rouse's Point, New York, to see and engage witnesses to attend said court	5 00
To expenses for self and horse, same time	2 25
To paid Tabor Deuel, a witness in said cause, as per debenture	1 40
To paid George Mott, as witness in said cause, a resident of Bangor, New York, 80 miles from court	12 00
To paid Thomas Crook, a witness in said cause, a resident of Plattsburg, New York, 20 miles from court, three days' attendance, including going to and returning from court	7 50
To paid Mrs. S. T. Morehouse, a witness in said cause, resident in St. John's, Canada East, forty miles from court, three days while at court, going and returning from court	8 00
To paid B. F. Wood, Aaron Stratton, E. T. Marney, Jas. McDougal, and S. M. Wood, residence at Rouse's Point, New York, three days going to and attending court and returning home, one dollar per day each	15 00
To paid for carrying said witnesses to court, 20 miles	6 50
To paid expenses of said witnesses going to court	1 25
To paid board of said witnesses while at court	4 75
To paid expenses of said witnesses returning from court	1 50
To paid for ferriages going to and returning from court	1 20
To paid clerk for court and jury fees	7 20
To attendance at court of self two days	5 00
To paid bill for board for self while at court	1 75
To paid for horse-keeping, same time	84
To paid for ferriages for self and horse going to and returning from court	75

SUPREME COURT, JANUARY TERM, 1845.

To two days' attendance at said court	5 00
To paid for board and horse-keeping while attending said court, same time	2 50

SUPREME COURT, JANUARY TERM, 1846.

To two days' attendance at said court	5 00
To paid bill for board and horse-keeping, same time	2 40

SUPREME COURT, JANUARY TERM, 1847.

To three days' attendance at said court	7 50
To paid bill for self and horse-keeping, same time	3 39

SUPREME COURT, JANUARY TERM, 1848.

To two days' attendance at said court.....	$5 00
To paid bill for board for self and horse-keeping, same time..	2 50
To paid clerk for court fees.....	4 50
To paid plaintiff for terms imposed by court from and including May term of county court, 1844, up to and including the January term of supreme court, 1848, as per receipt.....	37 60
To one day going to St. Albans to pay said terms to plaintiff's counsel, (O. Stevens,).....	2 50
To paid expenses, same time, self and horse.....	1 25

COUNTY COURT, FEBRUARY TERM, 1848.

To going to Burlington to see counsel and prepare said cause for trial; counsel was absent; remained at Burlington four days until counsel returned.....	10 00
To cash paid for bill at Burlington, same time, for self and horse.....	5 50
To one day returning from Burlington.....	2 50
To paid expenses for self and horse going to and returning from Burlington, same time.....	2 30
To one day going to St. Albans to furnish O. Stevens, plaintiff's counsel, with a copy of pleadings.....	2 50
To expenses self and horse going to St. Albans to furnish O. Stevens with a copy of pleadings.....	1 50
To one day going to clerk's office to file copy of pleadings.	2 50
To paid expenses for self and horse, same time.....	78
To paid postage on letters to and from counsel.....	40
To paid George W. Goodrich for going to Plattsburg to engage D. B. McNeil and Thomas Crook as witnesses in said cause, two days.....	5 00
To one day going to Canada to see and engage Tabor Deuel as a witness in said cause.....	2 50
To paid expenses for self and horse, same time.....	75
To two days going to Rouse's Point and Champlain, New York, to see and engage witnesses in said cause.....	5 00
To paid expenses for self and horse, same time.....	2 46
To paid postage on their letters to witnesses in said cause.	15
To one day going to St. Albans to consult counsel about witnesses in said cause.....	2 50
To paid expenses for self and horse, same time.....	1 30
To one day going to Rouse's Point to engage witnesses in said cause.....	2 50
To paid for expenses for self and horse, same time.....	44
To J. Barney for serving subpœna on Lawrence Clark and J. B. Bowdish, witnesses in said cause, and returning said subpœna.....	84
To paid for subpœna.....	25

To paid George Mott, a witness in said cause, a resident of Bangor, New York, eighty miles from said court.....	$12 00
To paid Thomas Crook, a witness in said cause, residence in Plattsburg, New York, twenty miles distant from court, two days.....	5 50
To paid D. B. McNeil, a witness in said cause, resident of Plattsburg, New York, 20 miles distant from court, two days, and expenses.....	5 50
To paid Tabor Deuel, a witness in said cause, residence in Canada, 22 miles distant from court, two days.....	2 00
To paid said T. Deuel for expenses to go to court and return.....	3 00
To paid B. F. Wood and E. T. Marney, witnesses in said cause, and also Aaron Stratton and James McDougal, witnesses in said cause, residents of Rouse's Point, New York, 20 miles distant from court, two days each.....	8 00
To paid for carrying said witnesses to court.....	3 00
To paid bill for board of said witnesses while at court.....	2 25
To carrying said witnesses home from court.....	3 00
To paid Lawrence Clark and J. B. Bowdish, witnesses in said cause, as per their debentures, one dollar and seventy cents each.....	3 40
To paid George W. Ames, witness in said cause, as per his debenture.....	1 30
To paid officer for serving and returning subpœna on witnesses.....	54
To paid for subpœna.....	25
To four days' attendance per self at court in said cause....	10 00
To paid bill for board, same time.....	3 00
To paid for horse-keeping, same time.....	2 00

COUNTY COURT, AUGUST TERM, 1848.

To paid John Knight for carrying C. Adams and self from ferry to court-house, four miles.....	50
To two days' attendance at said court.....	3 02
To paid bill for board while at court.....	1 75
To paid Hazen for ferriage.....	38

COUNTY COURT, ADJOURNED TERM, NOVEMBER, 1848.

To two days' attendance at said court.....	5 00
To paid Knight for ferriage going to court.....	50
To paid bill for board while at court.....	1 75
To paid for ferriage returning from court.....	31

COUNTY COURT, AUGUST TERM, 1849.

To going to Burlington to see counsel in said cause, and prepare said cause for trial, two days.....	5 00
To paid fare on steamboat, going and returning.....	2 88

To paid bill in Burlington, same time.....	$0 75
To going to Rouse's Point, New York, to look up testimony in said cause, one day.....	2 50
To paid ferriages going and returning.....	50
To paid bill at Rouse's Point, same time.....	25
To cash paid E. T. Marney for going to Chazy, New York, to see a witness in said cause.....	2 00
To paid B. F. Wood for services in looking up testimony in said cause.....	1 00
To paid E. T. Marney for services in procuring testimony in said cause.....	2 00
To cash paid out at Rouse's Point, New York, at an examination of witnesses in said cause, by C. Adams, my counsel in said cause, held at Rouse's Point, as follows:	
To one day's attendance per self.....	2 50
To paid expenses going and returning.....	75
To paid Schuyler Randle, witness in said cause.....	50
To paid James Sunderland, witness in said cause.....	50
To cash paid Charles Adams, counsel in said cause, to go to Fort Hamilton, New York, to see Colonel Justin Dimick, and to procure his testimony in said cause.....	20 00
To two days going to Burlington to see said Adams for the aforesaid purpose.....	5 00
To steamboat fare going and returning, same time	2 87
To cash paid James Sunderland for his services in getting witnesses collected at Rouse's Point, New York.....	1 00
To one day going to Champlain, New York, to see witnesses in said cause.....	2 50
To cash paid James McDougal for carrying me with his team from Rouse's Point, New York, to Chazy, New York, to see a witness in said cause.....	1 00
To cash paid for ferriages going to and returning from Rouse's Point, and bills for board same time.....	1 23
To two days going to Plattsburg, New York, to engage Thomas Crook, a witness in said cause, to attend said court.....	5 00
To cash paid J. Nichols for use of horse to go to Beekmantown, to see said Thomas Crook, same time.....	1 00
To paid bill for board at Plattsburg, same time.....	50
To paid steamboat fare going to and returning from Plattsburg, same time, 25 miles each way...	1 88
To one day going to Rouse's Point, New York, to bring witnesses to attend said court.....	2 50
To paid bill at Rouse's Point, same time.....	50
Witnesses brought from Rouse's Point, New York, to attend said court were as follows: James McDougal, Aaron Stratton, B. F. Wood, Schuyler Randle, E. T. Marney, and James W. Sunderland.	
To paid for ferrying said witnesses from Rouse's Point, New York, to Alburg, Vermont, four miles....	2 50
To paid for suppers for said witnesses and self at Alburg	1 75

To carrying said witnesses from Alburg to court, fourteen miles	$4 50
To paid ferriage, same time	50
To paid bill at court for said six witnesses, for lodgings, breakfast, and horse-keeping	3 87
To paid for ferriages returning from said court to Alburg	50
To carrying said witnesses from said court to Rouse's Point, New York, including ferriage from Alburg to Rouse's Point, 20 miles distant from court; also including Thomas Crook and Colonel Justin Dimick, witnesses, making eight persons in all	12 00
To paid for dinner for the aforesaid eighteen witnesses at Alburg when returning from said court	3 00
To one day attending said court	2 50
To paid bill at court for self	50
To paid James McDougal, Aaron Stratton, B. F. Wood, Schuyler Randle, E. T. Marney, and James W. Sunderland, two dollars each for attending said court	12 00
To paid E. T. Marney for going to Chazy, New York, to see witness	1 00

ADJOURNED TERM OF COUNTY COURT, NOVEMBER, 1849.

To going to Burlington to see counsel in said cause, two days	5 00
To paid fare on steamboat going to and returning from Burlington, same time	2 00
To paid bill at Burlington, same time	1 19
To three days' attendance at said court in said cause	7 50
To paid bill for self and horse while at court	3 19
To paid ferriages going to and returning from court	63
To paid clerk of court for copies of plaintiff's pleas	44

COUNTY COURT, FEBRUARY TERM, 1850.

To two days' attendance at said court	5 00
To paid bill for board, while at said court, and for expenses going to and returning from said court	2 50

COUNTY COURT, AUGUST TERM, 1850.

To attending said court two days in said cause	5 00
To paid bill for board, same time	1 50
To paid ferriages going to and returning from said court	63

COUNTY COURT, FEBRUARY TERM, 1851.

To going to Burlington to consult counsel and prepare said cause for trial, three days	7 50
To paid fare on steamboat going to and returning from Burlington, same time	2 00

To paid bill in Burlington, same time	$1 84
To paid ferriage from Rouse's Point to Alburg, and from Alburg to Rouse's Point, going and returning, same time	1 60
To paid bill at Rouse's Point, same time	60
To one day, self and horse, looking up testimony in said cause	3 50
To one day, self and horse, going to Champlain, New York, to procure testimony in said cause	3 50
To paid expenses, same time	62
To paid James Sunderland, same time, to procure testimony in said cause	1 00
To one day going to Canada, self and horse, to procure testimony in said cause	3 50
To paid expenses same, time	50
To one day, self and horse, going to Rouse's Point, New York, to engage witnesses to attend said court	3 50
To paid expenses, same time	62
To one day going to Swanton, Vermont, to see J. B. Bowdish and Lawrence Clark, witnesses in said cause, self and horse	3 50
To paid for subpœna and service	1 12
To paid officer to attend to J. B. Bowdish and Lawrence Clark, witnesses in said cause	3 00
To going to Rouse's Point, New York, with a team, and carrying James McDougal, James Sunderland, B. F. Wood, Aaron Stratton, and E. T. Marney, witnesses in said cause, to court, 20 miles	6 00
To paid board of said witnesses and self while attending said court	12 00
To paid each of said five witnesses for attending said court, $2	10 00
To carrying said five witnesses back to Rouse's Point	6 00
To four days attending said court	10 00
To paid A. Smith for bringing Colonel Justin Dimick and Doctor Hitchcock, witnesses in said cause, from South Hero, to court, 12 miles	2 00

SUPREME COURT, JANUARY TERM, 1852.

To two days attending said court	5 00
To paid bill for self and horse, same time	2 50

SUPREME COURT, CIRCUIT SESSION, AT BURLINGTON, 1852.

To two days' attendance at said court	5 00
To paid expenses for board, same time	1 83
To paid fare on cars going to and returning from said court, 50 miles each way	3 00

SUPREME COURT, JANUARY TERM, 1853.

To two days' attendance at said court.....	$5 00
To paid bill for board while attending at said court.....	1 50
To paid clerk for fees, August 31, 1853	9 73

SUPREME COURT, CIRCUIT SESSION, AT BURLINGTON, JUNE, 1853.

To two days' attendance at said court.....	5 00
To expenses for board while attending said court.....	1 68
To paid fare on cars going to and returning from said court, 50 miles each way	3 00

COUNTY COURT, AUGUST TERM, 1853.

To time spent going to Burlington to consult counsel and prepare said cause for trial, two days.....	5 00
To paid expenses for board, same time.....	1 56
To paid fare on cars going to and returning from Burlington, same time	3 00
To two days' attendance at said court.....	5 00
To paid expenses for self and horse, and use of horse, same time.....	3 35

COUNTY COURT, FEBRUARY TERM, 1854.

To going to Burlington to consult counsel and prepare said cause for trial, two days.....	5 00
To expenses for board, same time.....	1 83
To fare on cars going to and returning from Burlington, same time.....	3 00
To one day's attendance at said court, self and horse.....	3 50
To bill for board and horse-keeping while attending said court	1 75

COUNTY COURT, AUGUST TERM, 1854.

To two days going to Burlington to consult counsel and prepare said cause for trial.....	5 00
To bill for board, same time.....	1 83
To fare on cars going to and returning from Burlington, same time.....	3 00
To one day's attendance at said court, self and horse.....	3 50
To bill for board and horse keeping while at court.....	87
To paid Phelps ferriages going to and returning from court, same time.....	40

COUNTY COURT, FEBRUARY TERM, 1855.

To two days going to Burlington to consult counsel and prepare said cause for trial.....	5 00

To bill at Burlington, same time	$1 93
To fare on cars going to and returning from Burlington, same time	3 00
Two days' attendance at said court, with horse	7 50
To expenses for self and horse while at said court	2 42

COUNTY COURT, AUGUST TERM, 1855.

To one day going to Burlington to consult counsel and prepare said cause for trial	2 50
To fare on cars going to and returning from Burlington, same time	3 00
To bill for board in Burlington, same time	50
To two days attending said court, with horse	7 50
To bill for board and horse-keeping while attending said court	2 84
To paid Phelps for ferriages, same time	50

COUNTY COURT, FEBRUARY TERM, 1856.

To two days going to Burlington to consult counsel and prepare said cause for trial	5 00
To fare on cars going to and returning from Burlington, same time	4 00
To expenses for board at Burlington, same time	2 00
To going to Rouse's Point, N. Y., to engage witnesses to attend said court, self and horse, one day	3 50
To carrying James McDougal, Aaron Stratton, B. F. Wood, and Thomas Crook, witnesses in said cause, from Rouse's Point, N. Y., to court, twenty miles	5 00
To bill for board for self and the aforesaid witnesses, J. McDougal, Aaron Stratton, B. F. Wood, and Thomas Crook	6 25
To paid James McDougal for time attending said court	2 00
To paid Aaron Stratton and B. F. Wood $1 each	2 00
To paid Merit Rockwell, witness, as per his debenture	1 25
To carrying James McDougal, Aaron Stratton, B. F. Wood, and Thomas Crook from court to Rouse's Point, New York, twenty miles	5 00
To two days' attendance on said court	5 00

COUNTY COURT, AUGUST TERM, 1856.

To two days going to Burlington to consult counsel and prepare said cause for trial	5 00
To paid fare on cars, same time, going to and returning from Burlington	3 00
To paid bill for board while at Burlington	1 75
To one day going to Rouse's Point, New York, to engage witnesses to attend said court	2 50
To paid bill for expenditures, same time	56

To carrying James McDougal, Aaron Stratton, and B. F. Wood, witnesses in said cause, from Rouse's Point, New York, to court, and from court to Rouse's Point; twenty miles each way	$10 00
To paid James McDougal, Aaron Stratton, and B. F. Wood, witnesses in said cause, $1 50 each	4 50
To paid Merit Rockwell, witness in said cause, as per his debenture	1 25
To paid bill for board of witnesses from Rouse's Point, New York, while attending said term of court	3 50
To two days' attending said court	5 00
To paid bill for board per self while attending said term of court	1 53
To omitted in May term of county court, 1840: paid board of witnesses while attending said court	3 00

COUNTY COURT, FEBRUARY TERM, 1849.—(Omitted in its proper place.)

To two days going to Burlington to see counsel and prepare said cause for trial	5 00
To paid expenses at Burlington, same time, for board	1 69
To use of horse and horse-keeping going to and returning from Burlington, same time	3 00
To two days attending said court	5 00
To paid bill for board, self and horse, while at court	1 75
To paid Thomas Crook for services attending county court, August term, 1849	5 00
To paid Thomas Crook for time, attending February term of county court, 1856	5 00
(The two last items were left out in the account of those terms.)	
To paid Charles Adams, esq., counsel in said cause	732 67
To paid H. R. Beardsley, esq., counsel in said cause	742 61
To paid S. S. Brown, esq., counsel in said cause	30 00
To paid for printing petition accompanying this account	22 00
	2,849 92
Deduct from the above account $20, paid Charles Adams, August, 1849, it being charged in his account	20 00
	2,829 92

DANFORD MOTT.

WINDMILL POINT, *Vermont*, *January* 2, 1858.

UNITED STATES, *District of Vermont:*

At Bennington, on this eighteenth day of March, A. D. 1858, before honorable David A. Smalley, judge of the district court for the district of Vermont, personally came Danford Mott, of Alburg, in said district, and being sworn, says the above and foregoing account, by him made against the United States, and signed by him, is justly and truly charged; that the personal services by himself were rendered as there charged; that the moneys charged as paid to clerks and witnesses were for services actually performed, and the amounts paid as charged; and that the services of his attorneys were for services rendered by his request, and rendered in the defence of said suit.

DANFORD MOTT.

UNITED STATES, *District of Vermont, ss:*

There personally appeared Danford Mott, the above-named deponent, and made solemn oath that the statements in the foregoing affidavit made are true, according to his best knowledge and belief. Before me,

D. A. SMALLEY,
United States Judge.

BURLINGTON, *March* 18, 1858.

BURLINGTON, VT., *March* 18, 1858.

I, Charles Adams, of Burlington, in the State of Vermont, being sworn, say that I was engaged by Danford Mott, in 1839, to aid him in his defence in the suit of De Clancy Stoughton against him, and aided in the defence from that time to the final judgment in August, 1856, in favor of the defendant. The facts stated in Col. Mott's petition, as presented to the Court of Claims, I know are all truly stated. I know that Col. Mott attended court at the several terms from the time of my engagement to the end. Most of the witnesses resided out of this State, and it required some labor to look them up. I made a journey to Champlain to see a part of them and ascertain what they knew of the matter. I made a journey to the city of New York and visited Col. Dimick at Fort Hamilton, to learn what he could say and to engage his attendance, and I procured an order from the department at Washington for the attendance of Col. Dimick and Doctor Hitchcock, and they attended and testified, and I suppose were paid by the government. All the other persons to whom payments are charged as witnesses I know attended and testified. I suppose Col. Mott paid them, as well as the court fees and jury fees. In the commencement of the suit I drew up a statement of the facts, directed the same to the Secretary, in 1840, as stated in the brief. I also drew up a full statement of the case a second time, in pursuance of the letter from the solicitor, C. B. Penrose, which letter is herewith transmitted. I have charged for my services what I consider a reasonable compen-

sation and no more. Mr. Beardsley was with me in the defence, and aided therein.

After the suit was virtually ended by the decision of Judge Redfield and the supreme court, in 1853, it *so happened* that the Vermont legislature never so far improved upon as to pass the act, as stated in the petition. I know that Col. Mott has been and is a faithful officer, and from repeated conversations with Gen. Wool and Col. Dimick, that he was regarded as second to no one.

I know that Col. Mott has suffered severely in the defence of this extraordinary and vexatious suit, and has been compelled to make sacrifices to sustain the defence.

CHARLES ADAMS.

UNITED STATES, *District of Vermont:*

On this 18th March, 1858, personally appeared Charles Adams, and made oath that the facts stated in the foregoing affidavit are true, according to his best recollection and belief. Before me,

D. A. SMALLEY,
District Judge for Vermont.

This deposition may be read in evidence.

R. H. GILLET,
Solicitor of Court of Claims.

OFFICE OF THE SOLICITOR OF THE TREASURY, *May* 11, 1844.

SIR: The Secretary of the Treasury has referred to me your letter of the 4th instant, from which I learn that the suit of D. C. Slaughter against yourself for damages for seizing the sloop General Macomb during the troubles on the Canada frontier in 1839, by order of the government, has been again tried in the court below, and a verdict rendered for plaintiff of $427 damages; that a bill of exceptions has been taken, and you request instructions as to whether you shall again carry it to the supreme court of the State.

Upon turning to the correspondence of this office I see that General Kellogg, late district attorney, was instructed to appear to this suit and defend it on behalf of the United States, and I perceive from your letter that Mr. Charles Adams aided him in the management of the suit. Before I answer your letter it is necessary to have a full and particular report of the state of the case, the material points upon which it turned, and the evidence which was offered to the court. Without this I cannot understand it, or determine whether it is necessary and proper further to pursue it. I have to request, therefore, that you apply as soon as possible to the counsel who managed the case, and request them to transmit the required report without delay, and as soon after its receipt as possible the necessary instructions will be forwarded to you.

The government has every disposition to protect its officers in the discharge of their duties, and I am desirous to do so effectually, but cannot act until fully informed.

Very respectfully, yours,

CHARLES B. PENROSE,
Solicitor of the Treasury.

D. MOTT, Esq.,
Deputy Collector and Inspector, Windmill Point, Vermont.

TREASURY DEPARTMENT, *February* 17, 1848.

SIR: I have the honor to acknowledge the receipt of your letter of the 16th instant, enclosing that of C. Adams, esq., and the papers respecting the case of Houghton *vs.* Mott, and have referred them to the Department of State to give the necessary directions, the facts in regard to the frontier troubles out of which this case arose having been reported to and acted on by that department.

Very respectfully, your obedient servant,

McC. YOUNG,
Acting Secretary of the Treasury.

Hon. GEORGE P. MARSH,
House of Representatives.

WAR DEPARTMENT,
Adjutant General's Office, Washington, January 18, 1851.

SIR: The Secretary of War directs that you repair to North Hero, in the county of Grand Isle, Vermont, where your presence will be required as a witness in a civil suit on the 25th of February.

Respectfully,

R. JONES,
Adjutant General.

Brevet Colonel J. DIMICK,
Major 1st Artillery, Portsmouth, N. H.
Assistant Surgeon C. M. HITCHCOCK,
Through Commanding Officer Castle Pinkney, C. Harbor, S. C.

WAR DEPARTMENT,
Washington, January 20, 1851.

SIR: Your letter of the 9th instant to the Secretary of State, requesting that measures be taken to obtain the attendance of Brevet Colonel Dimick and Dr. C. M. Hitchcock, of the army, as witnesses in a suit pending in one of the State courts of Vermont, has been referred by

him to this department, and an order issued in compliance with your request, of which I herewith enclose a copy.

Very respectfully, your obedient servant,

C. M. CONRAD,
Secretary of War.

CHARLES ADAMS, Esq.,
Burlington, Vermont.

TROY, *December* 25, 1850.

MY DEAR SIR: Your favor without date, postmarked November, was not received until a few days since, on my return from Washington, after an absence of nearly eight weeks.

Colonel Justin Dimick is in Florida, but ordered to California. Dr. C. M. Hitchcock is stationed at Savannah, Georgia. I regret that my old friend, Colonel Mott, should still be annoyed with our *patriotic* troubles. Justice is slow but sure. I hope the time will come when he will be rewarded for his services to the country.

I thank you again and again for your kind wishes in my behalf. Your uniform kindness, and particularly when I required friends, will never be forgotten. General Clark, of Burlington, said he intended to publish Mr. Bayliss's account of my long march from San Antonio to Saltillo, Mexico. It contains some facts not hitherto published. I think you will find it interesting. Read it for my sake.

Very truly, yours,

JOHN E. WOOL.

CHARLES ADAMS, Esq.,
Counsellor at Law, Burlington, Vermont.

Certificate of clerk of Grand Isle county.

DE CLANCY STOUGHTON, JR., *vs.* DANFORD MOTT.

I, Jed. P. Ladd, county clerk of Grand Isle county, hereby certify that the above-entitled suit, De Clancy Stoughton, jr., *vs.* Danford Mott, was entered upon the docket of the Grand Isle county court at the May term, 1839.

At the February term, 1856, the entry on the docket is: "Bail to be entered to the acceptance of the clerk by 1st of July, 1856, in $100, by bond, and $150 by the 1st day of next term. August term, 1856. Nonsuit for want of bail."

The defendant's cost is taxed and allowed upon the docket at the sum of three hundred and one dollars and ninety cents, and no execution has been issued for the same.

The above are true copies from entries made upon the docket of this court.

In witness whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court at North Hero, in said Grand Isle county, this 19th day of April, A. D. 1859.

JED. P. LADD,
County Clerk.

Deposition of H. R. Beardsley.

STATE OF VERMONT, *County of Franklin, ss:*

On this twentieth day of April, A. D. 1859, personally came Herman R. Beardsley, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Herman R. Beardsley, of St. Albans, in the county of Franklin and State of Vermont, taken at the request of Danford Mott, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of said Danford Mott. The adverse party was not notified, did not attend, and did not object.

GEORGE F. HOUGHTON,
United States Commissioner to take Affidavits, &c.

First interrogatory. How much did you charge Mott for your services in defending him against the suit or suits brought against him by De Clancey Stoughton for seizing the sloop "General Macomb," at the time of the Canadian disturbances on the frontiers of New York and Vermont, in 1838? And have you been settled with by said Mott?

Answer. The amount of my charges against Danford Mott are contained in a copy of my account charged against him on book, and is hereto attached and marked "A" by this commissioner.

Of said account, Mr. Mott paid me, March 3, 1848, twenty-five dollars; December 11, 1852, he paid me one hundred dollars; September 22, 1853, he paid me one hundred dollars; November 7, 1856, he paid me one hundred and forty-eight dollars and fifty cents; and October 20, 1858, he paid me one hundred dollars, amounting in all to four hundred and seventy-three dollars and fifty cents. The balance of my account hereto attached still remains unpaid, and for which I hold the said Mott solely liable.

Second interrogatory. Have you any charges for these services against the United States?

Answer. I have no charges against the United States for said services, but look to said Mott solely for the payment thereof. That said Mott would have paid the balance of my account against him before this, undoubtedly, if I had insisted upon it; but in consideration of the expense and trouble which said Mott was obliged to incur in the defence of said suit I have forborne to press him for payment.

Third interrogatory. There is a charge in Mott's account paid to S. S. Brown, counsel in said cause, $30; do you know that said Brown assisted, and is that a reasonable charge?

Answer. I do know that said Brown assisted in said cause and that I consider said charge of $30 a reasonable one.

H. R. BEARDSLEY.

First cross-interrogatory. How much money has Mr. Mott paid you for defending the suits mentioned in the first interrogatory?

Answer. He has paid me four hundred and seventy-three dollars and fifty cents.

Second interrogatory. Please give a copy of the bill which was paid you by Mr. Mott.

Answer. My whole account, with the payments made thereon, is attached to this my deposition, which I testify to be justly and truly charged and that the same is reasonable.

H. R. BEARDSLEY.

Fees of witness: Travel, ten cents.
Attendance, $1.
Commissioner's fees, $5.

The original interrogatories and cross-interrogatories, signed by claimant's attorney and deputy solicitor for the United States, are appended hereto.

Attest:

GEORGE F. HOUGHTON,
U. S. Commissioner, &c., &c.

A.

Danford Mott to H. R. Beardsley, Dr.

Grand Isle county court, May term, 1839.—To retaining fee, D. C. Stoughton *vs.* you, for sloop	$3 00
To term fee in ditto	2 00
September term, 1839.—To term and attorney's fee, D. C. Stoughton *vs.* you	5 00
To trial and argument in ditto	10 00
May term, 1840.—To preparation for trial, Stoughton *vs.* you	5 00
To term and attorney fee in ditto	5 00
To trial and argument in ditto	20 00
September term, 1840.—To term and attorney fee in ditto	5 00
To preparation for trial in ditto	5 00
To argument in ditto	10 00
Superior court, January term, 1841.—To preparing brief in ditto	15 00
To copies for court in ditto	5 00
May term, 1841.—To term and attorney fee in ditto	5 00
To trial in ditto	10 00
To argument in ditto	10 00
January term, 1842.—To term and attorney fee in ditto, superior court	7 00
To preparation in ditto	10 00

To argument in ditto	$10 00
To copies in ditto	3 00
January term, 1843.—To preparing case in ditto	10 00
To argument in ditto	10 00
May term, 1843.—To term fee, Stoughton *vs.* you	3 00
To preparing pleadings in ditto	2 00
September term, 1843.—To term fee and pl. trial in ditto	5 00
May term, 1844.—To term and attorney fee, Stoughton *vs.* you	5 00
To trial in ditto	10 00
Superior court, January term, 1845.—To term and attorney fee, ditto *vs.* ditto	10 00
To trial, argument, briefs, copies, &c	15 00
January term, 1846.—To term fee, Stoughton *vs.* you	2 00
To preparation in ditto	5 00
January term, 1847.—To preparing case, Stoughton *vs.* you	20 00
To argument in ditto	15 00
To term and attorney fee in ditto	5 00
Superior court, January term, 1848.—To term fee and attorney fee in ditto	5 00
To motion for repleader and argument	10 00
February term, 1849.—To term and attorney fee in ditto	5 00
To preparation in ditto	5 00
To argument in ditto	10 00
August term, 1848.—To attention to said suit	6 61
February term, 1849.—To attention to said suit	15 00
August term, 1849.—To attention to said suit	10 00
November adjourned term, 1849.—To attention to said suit.	10 00
February term, 1850.—To attending to suit, Stoughton *vs.* you	20 00
August term, 1850.—To attention to said suit	20 00
February term, 1851.—To term and attorney fee in ditto	5 00
To preparation for trial in ditto	20 00
To trial and argument in ditto	30 00
January term, 1852.—To examining and preparing said case	15 00
To term and attorney fee in ditto	5 00
January term, 1853.—To preparing said case	20 00
To term and attorney fee in ditto	5 00
August term, 1853.—To attention to said suit	25 00
February term, 1854.—To preparation of said suit	15 00
To term fee in ditto	5 00
August term, 1854.—To term fee in ditto	5 00
To attention to said suit	20 00
To opposing motion for continuance, and argument	20 00
September adjourned term, 1854.—To opposing motion to file new counts and arguments in ditto	10 00
February term, 1855.—To term and attorney fee in ditto	5 00
To preparation in ditto	25 00
To trial in ditto	25 00
August term, 1855.—To term and attorney fee in ditto	5 00
To preparation in ditto	15 00

To trial and argument on demurer.....	$15 00
To motion to dismiss new counts in ditto, and argument	5 00
February term, 1856.—To term fee and preparation in ditto.	20 00
August term, 1856.—To term and attorney fee in ditto.....	5 00
To preparation for trial in ditto.....	40 00
	748 61
Interest on ditto.....	66 00
	814 61

Deposition of Charles Adams.

Interrogatories to be put to Charles Adams, esq., attorney and counsel:

1. Has the claimant settled with you for your charges in defending him in the suit or writs brought against him by De Clancy Stoughton in the Vermont courts for seizing the sloop General Macomb, at the time of the Canadian disturbances on the frontiers of New York and Vermont in 1838; and have you correctly stated those charges in your deposition heretofore taken?

2. Has said Mott received or collected anything from said Stoughton in the way of costs or damages upon the payment or execution, in the suits in which said Mott was successful; if so, how much?

3. Have you made any charge or claim against the United States for your services; and do you hold the United States accountable to you for anything done by you in defending Mott?

C. K. AVERILL,
Attorney for Claimant.

Cross-interrogatories.

1. If to the first interrogatory you answer in the affirmative, please state in what deposition you have stated your charges; and what amount you stated therein; and has the amount been paid to you by said Mott; and have you a copy of your bill against him?

3. If you answer to the second interrogatory that Mott has collected nothing from Stoughton, state how you know he has not, and what means Mott has or had of recovering against Stoughton, and whether those means have been abandoned?

J. D. McPHERSON,
Deputy Solicitor.

4. If H. R. Beardsly, esq., who aided, is not living, answer to the interrogatories made to him as far as you know or can state.

C. K. AVERILL,
Attorney for Claimant.

CHARLES ADAMS, of Burlington, Vermont, produced as a witness in behalf of the petitioner in the above entitled suit, being first duly sworn, deposes as follows:

To the first direct interrogatory, I answer that the petitioner has settled with me for my charges for services and expenditures in defending against the suit of De Clancy Stoughton against him in the courts of Vermont for the alleged seizure and destruction of the sloop called the General McComb on the 7th of November, 1838.

I do not recollect that I have heretofore made any deposition relative to my account, or the amount of charges for service and expenditures. I made an affidavit, sworn to before Hon. D. N. Smalley, district judge, stating my employment by Mott to defend the suit and my defence thereof; but if anything was said as to the amount of my charges it has escaped me. I was engaged by Mr. Mott at the spring term of Grand Isle county court in 1839, and continued the defence until August, 1856, when the suit was finally decided in favor of the defendant Mott. After the suit was ended I advised Mr. Mott to prefer his petition for a remuneration, and on that occasion I made out a statement of my account, and of the sums he had from time to time paid me. My charges for services and expenditures, including twenty dollars for drawing his petition to the Court of Claims, amounted to $732 67. He had, before the second day of January, 1858, paid me $396 31, and on that day paid me one hundred dollars more, making in all $496 31; and the balancc being $236 36, I credited by charging same to new account, and gave him a copy of my account with such settlement.

A copy of my account, as made out and settled, will accompany this deposition. I then charged him the said balance of $236 36, which, with the interest from January 2, 1858, and some additional charges for subsequent services, I claim from him, and expect payment.

To the second interrogatory I have to say, that Mott has not collected anything on his judgment for cost to my knowledge; and as I had the chief direction of the suit think I must have known it had any such collection been made. The plaintiff, Stoughton, as I understood, had, before final judgment, become insolvent and had removed from the State, and I thought it useless to take execution on the judgment, and none was issued.

To the third and last direct interrogatory, I say I have no charge or claim against the United States for services or expenditures in said suit and never made any, and have made no account against them.

CHARLES ADAMS.

BURLINGTON, VERMONT, *April* 20, 1859.

To the first cross-interrogatory I say: I do not recollect of making any previous statement of my account; in my answer to the direct interrogatories I have stated the facts in relation to my account, the amount paid me, and the balance due me, and beg leave to refer to the copy of my account as settled for all the particulars; the balance, as therein stated, of $236 36, with the interest, I claim from Mr. Mott, and shall insist on payment.

To the second cross-interrogatory I answer: That I think Mott has not collected anything on his judgment for cost against the plaintiff Stoughton, nor from the bail; my reasons for this opinion are that I have ever had the principal direction of the suit, and if anything had been realized think I must have known it; during the progress of the suit, as I understand, Stoughton became insolvent, and a notice was served on me by Orlando Sheves, the principal attorney for Stoughton, that the claim had been assigned by the plaintiff to Stevens and a Mr. N. L. Whitteman, and that no payment must be made to Stoughton, and about that time Stoughton left the State, and I have never seen him since; in 1848 I moved for additional bail for cost, and procured an order for $75, which was all I could get; said Mr. Stevens entered bail in that sum, but before the end of the suit Stevens also removed from the State, and now resides at or near St. Paul's, as I understand, and, as I suppose, insolvent; in 1854 I procured a further order for bail, and Frederick Hazen entered in the sum of one hundred dollars; I then considered Hazen good for that, but he has recently died; I think this sum might have been realized, but I understood from my client that at Hazen's request he had given him some respite; Hazen's estate may not be very good, but if that bail is lost I think Mr. Mott should remit it to the United States; as for anything beyond that I would not give a straw for it; at the February term, 1856, we found on examination that the bail originally taken was lost by the strange disappearance of the original writ; that writ is not to be found, and the clerk can give no account of it, and we have no means of fixing the bail or of knowing who the bail was; on these facts, at said February term, 1856, I obtained an order of court for bail in $250, as before the next term of the court; but at the next term the acting attorney declined to give the bail, and a nonsuit, for want of bail, was ordered, and thus this vexatious suit was ended. Colonel Mott rendered himself particularly obnoxious to the patriots by his endeavors to enforce the neutrality act. The officers of the general government, Colonel Dimick, General Wool, and General Scott will all bear testimony to the very faithful manner in which Colonel Mott aided them in the discharge of their duties. From conversations with Colonel Dimick and General Wool, I know the fact that they relied much upon the local acquaintance of Mott, and availed themselves of his aid.

The accounts hereto annexed marked (A) by D. A. Smalley, district judge, is my account referred to against Colonel Mott. It is justly and truly charged, and I think the charges very reasonable in amount.

CHARLES ADAMS.

BURLINGTON, VERMONT, *April* 21, 1859.

UNITED STATES, *District of Vermont:*

Then personally appeared the within named deponent, Charles Adams, personally known to me, and subscribed in my presence the answers to the foregoing interrogatories and cross-interrogatories, and

made solemn oath that the facts therein stated are true, and that said answers contain the whole truth and nothing but the truth.

Before me:

D. A. SMALLEY,
District Judge.

BURLINGTON, *April* 21, 1859.

Col. Danford Mott in account with C. Adams, Dr.

April, 1839.—To engage in suit in Grand Isle county court De Clancy Stoughton *vs.* you	$25 00
Term fee in same	5 00
September term, 1839.—Term fee	5 00
Trial (jury disagreed)	10 00
Filing new pleas	5 00
February term, 1840.—Term fee	5 00
Trial (verdict for plaintiff reversed)	10 00
July, 1840.—To drawing memorial	10 00
Trial on motion to dismiss suit	10 00
Term and attorney fee	10 00
January term, 1841.—Term fee in superior court	5 00
Briefs, copies, and argument	25 00
May term, 1841.—Trial in county court, on the frontier question	10 00
Term and attorney fee	10 00
Preparing exceptions	5 00
January term, 1842.—Term fee in superior court	5 00
Briefs, copies, and argument	25 00
January term, 1843.—Term fee, briefs, and copies and re-argument	35 00
May term, 1843.—Term fee (continued)	5 00
September term, 1843.—Term fee (continued)	5 00
May term, 1844.—Term fee, trial by jury, and preparing exceptions	30 00
January, 1845.—Term fee in superior court	5 00
Briefs, copies, and argument	25 00
(Held for advisement.)	
January term, 1846.—Term fee	5 00
January term, 1847.—Term fee	5 00
January term, 1848.—Term and attorney fee on judgment	10 00
To drawing new set of pleas	10 00
February, 1848.—Correspondence with Secretary at Washington and with district attorney	10 00
Copies for district attorney	5 00
February term, 1848.—Term fee in county court	5 00
August term, 1848.—Term fee and expenses, continued to adjourned term	10 00
November adjourned term, 1848.—Trial on demurrer to report	10 00

Term and attorney fee (report insufficient)	$10 00
February term, 1849.—Term fee and expenses (continued)	10 00
June, 1849.—Journey to Champlain and examination of witnesses	15 00
August 11, 1849.—Going to New York and engaging attendance of Col. J. Dimick	25 00
Amount of expenses.	15 37
September term, 1849.—Term fee and expenses	10 00
November adjourned term, 1849.—Trial on demurrer	10 00
Term and attorney fee	10 00
February term, 1850.—Term fee and expenses	10 00
August term, 1850.—Term fee and expenses	10 00
February term, 1851.—Trial by jury (very long)	20 00
Term and attorney fee	10 00
Preparing exceptions (6 pages)	10 00
January term, 1852.—Term fee in superior court	5 00
Briefs, copies, and argument	25 00
January term, 1853.—Re-argument	25 00
Extra preparation	15 00
Term and attorney fee	10 00
Copies of exceptions and brief for district attorney	10 00
July, 1853.—At circuit term of superior court	10 00
September term, 1853.—Term fee in county court and expenses	10 00
February, 1854.—Term fee and argument on question of new counts in trover	20 00
August term, 1854.—Trial by court on demurrer to new counts	10 00
February, 1855.—Drawing pleas to new counts	5 00
August, 1855.—Protracted argument on the power of the legislature to allow new pleadings in pending suits	25 00
Term fee (plaintiff gets leave to amend)	5 00
February, 1856.—Term fee and expenses	10 00
(Continued under rule for bail.)	
August term, 1856.—Term and attorney fee	10 00
(On nonsuit for want of bail.)	
Preparation for trial and taxing cost	12 00
Omitted:	
Copies for C. B. Penrose.	5 00
Copies for District Attorney Underwood	5 00
Expense of getting opinion of circuit court, Stoughton *vs.* J. Dimick, and copy of the record	5 30
January 2, 1858.—To drawing his petition to Court of Claims	20 00
	732 67

Colonel D. Mott, Cr.

March 3, 1848.—By cash	$25 00	
June 13, 1849.—By cash	10 00	
June 26, 1849.—By cash	2 75	
August 4, 1849.—By cash	20 00	
February 9, 1850.—Paid A. Thompson	100 00	
February 28, 1851.—Cash	10 00	
Paid teamster	3 00	
December 1, 1851.—Paid to Blodgett	227 56	
Paid to me	100 00	
		$496 31
January 2, 1858.—By balance charged to new account		236 36
		732 67

Colonel Danford, Dr.

January 2, 1858.—To this due me for amount credited to balance old account	$236 36

CHARLES ADAMS.

D. A. SMALLEY, *District Judge.*

Additional account—United States to Danford Mott, Dr.

To this sum paid for printing brief, May 31, 1858	$14 00	
Paid county clerk for certificate		75
Paid G. F. Houghton for his fees, taking deposition of H. R. Beardsley	5 00	
Postage		9
H. R. Beardsley, his fees as witness	1 10	
Going to county clerk's office at North Hero for certificate	2 50	
Expenses same time		50
One day at St. Alban's to get Beardsley's deposition	2 50	
Expenses, car fare, &c	2 75	
Journey to Burlington to obtain C. Adams's deposition, two days in all	5 00	
Expenses for fare same time	4 37	
		48 56

APRIL 21, 1859. DANFORD MOTT.

Danford Mott to C. K. Averill, Dr.

To counsel and attorney's fees, agreed upon for the argument of this case	$300 00
May, 1859.—Received on the above charge	50 00
Oct., 1859.—Received on the above charge the further sum of	50 00

C. K. AVERILL.

Opinion of the Attorney General—Case of Captain Wilkes.

No 20.]

ATTORNEY GENERAL'S OFFICE,
July 14, 1857.

SIR: Captain Wilkes, while in command of the exploring expedition, caused one of his men to be punished for disobedience of orders. After his return the man brought an action of trespass against Captain Wilkes, which, after several trials, was abandoned by the plaintiff.

I consider the decision of the Supreme Court and the final termination of the cause under an opinion given by that tribunal, as establishing fully that the orders disobeyed by the plaintiff were the lawful orders of his superior officer, and that the punishment for such disobedience was inflicted by Captain Wilkes in the discharge of his proper duty.

Captain Wilkes suffered seriously by this litigation; for though it was finally determined in his favor, his defence put him to a heavy expense, besides the trouble and vexation of it. He now demands that the government will reimburse those expenses; and you ask whether, in my opinion, his claim is valid.

When an officer of the United States is sued for doing what he was required to do by law, or by the special orders of the government, he ought to be defended by the government. This is required by the plain principles of justice as well as by sound policy. No man of common prudence would enter into the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits, which he must carry on at his own expense. For this reason it has been the uniform practice of the federal government, ever since its foundation, to take upon itself the defence of its officers who are sued or prosecuted for executing its laws.

In Little *vs.* Barems, 2 Cr. 170, the government took no part in the defence, but it afterwards assumed the judgment, and paid it with interest and all charges.

If an officer sued for doing his duty carries on his own defense, without appealing to the government for aid during the pendency of the cause, I think he has a just claim, after it is determined, to be placed in as good a condition as he would have been if the government had taken the defence on itself; in other words. to be repaid the sum

he is out of pocket. Of course he is not to be allowed any unreasonable or extravagant expenses.

I see no reason why Captain Wilkes should not have what he asks.

I am, most respectfully, yours, &c.,

J. S. BLACK.

Hon. ISAAC TOUCEY,
Secretary of the Navy.

ATTORNEY GENERAL'S OFFICE,
April 2, 1859.

The above is a true copy of the original in this office.

A. ROANE, *Clerk.*

Letter of Fourth Auditor.

TREASURY DEPARTMENT,
Fourth Auditor's Office, July 24, 1857.

SIR: Herewith you will receive a certificate for $2,129 75, payable by the navy agent at Washington, which sum is the amount due on account of costs, counsel's fees, &c., in a suit of law, brought against you for acts done in an official capacity.

Very respectfully, your obedient servant,

A. O. DAYTON.

Captain CHARLES WILKES,
United States Navy, Washington City.

A true copy.

A. J. O'BANNON,
Fourth Auditor.

Letter from the Secretary of State.

DEPARTMENT OF STATE,
Washington, March 25, 1858.

SIR: Your letter of yesterday with the papers relative to the claim of Danford Mott for services, in a suit relative to the seizure of the sloop General McComb, in 1838, has been received. In reply I have to inform you that, as those services do not appear to have been rendered or those expenses incurred, pursuant to any instructions of or authority from this department, the department is not considered liable therefor. A compliance with your request that the account may be examined with a view to its approval is also declined for this and other obvious considerations; the papers are consequently herewith returned.

I am, sir, your obedient servant,

LEWIS CASS.

C. K. AVERILL, Esq.,
Washington.

IN THE COURT OF CLAIMS.

No. 1,620.

DANFORD MOTT *vs.* THE UNITED STATES.

The petitioner insists that the facts, as detailed in the petition, sufficiently show the existence of an *implied contract*, on the part of the government, to remunerate him for his services and expenditures in the seizing and detention of the sloop General Macomb, and the arms and munitions of war.

In cases of ordinary, general legislation, where services are authorized or required, and where compensation is provided by fees, a fixed salary, or specific provision for payment, as in the case of marshals, collectors, &c., in the discharge of ordinary duties, there may be no sufficient ground for an *implied contract*. But we insist there is a wide distinction between the common, ordinary general legislation and what may be termed the extraordinary legislation, where specific services are required but no provision is made, by fees or otherwise, for compensation. The latter, though in form are *acts and laws*, in effect are commissions by the government for the performance of some specified act. The act of 10th March, 1838, commonly called the Neutrality Act, is a fair illustration of the distinction, and is in point. The act was temporary—limited to two years. It was a legislative provision for a particular purpose, to stay the avalanche of impulsive citizens from precipitating themselves into the province of Canada in aid of the *patriots*, so called, in their rebellion. The object of the act is apparent from the whole tenor of it—that of preserving the peace of the nation in the restraint of our own citizens from unauthorized interference in the affairs of Canada. The first section provides for the seizure and detention of vessels, arms, &c., by certain officers, collectors, marshals, &c., or by *any other officer specially appointed by the President*. By the eighth section it is made lawful for the President, or for such person as he may empower for that purpose, to employ such part of the land or naval force of the United States, or of the militia, as should be necessary to prevent the violation, and to enforce the due execution of the act. In the circuit court for the district of Vermont, in October, 1855, a suit was decided in favor of this same Stoughton against Colonel Dimick, for seizing this same sloop General Macomb; and on the trial of that cause it was shown by copies from the files at Washington that under instructions from the President a military force was detailed and stationed at different points—at Niagara, Sackett's Harbor, and Plattsburg, and that Colonel Dimick, then a captain of engineers, was stationed at Champlain, and aided in the seizure. The petitioner, Mott, as collector, was bound to aid in the seizure; and, in addition thereto, was required by Captain Dimick to assist with his boat and men, which was done, and the sloop and arms seized. This statement shows the performance of meritorious service for the government, and by their direction, for which compensation in some form may be rightfully claimed, on the ground that

there is *an implied contract* on the part of the government to pay for the service.

The first inquiry in the case is, whether the facts set forth in the petition are sufficient to establish a contract on the part of the government for the payment for the services rendered. On this point there is little or no room for any dispute. It is but the common principle existing between individuals, where services are rendered by one at the request of another, where the law will imply a contract for payment of a reasonable sum for such services. In this case the act of 10th March, 1838, is in legal effect a request or command by the government for the services of marshals, collectors, and others, for a particular service; and meritorious service being rendered, and no provision being made in the act for payment, and none being provided by any general law, by fees or otherwise, for such payment, the law will imply a contract on the part of the government for payment of a reasonable sum for the services. The identical case has therefore occurred contemplated by the act creating the Court of Claims, and they will take jurisdiction of it, and entertain and consider the petition.

The second inquiry, as to the extent of the contract, may not at first be so perfectly apparent, but can be made sufficiently so by a little consideration. On this point we insist that the contract is of such an extent as to embrace an *indemnity* to the parties against the consequences of the acts performed for the government, and at their request or command.

The request may be resolved into three inquiries: the state of things on the northern frontier at the time of the act of March 10, 1838, called the Neutrality Act, the peculiar characteristics of that act, and the object to be attained by it.

Without restating the facts set forth in the petition, we may yet refer to them; and from them, as well as from a historic knowledge of the period, we learn that the winters of 1837–'38 was a period memorable for one of those strange outbreaks which, from the time of Peter the Hermit to the present hour, have had an epidemic occurrence, when reason was silenced in the clamor of fanaticism, and true patriotism was made subservient to the most false and dangerous conceptions of the claims of philanthropy. From Detroit to Alburgh the whole country, as if moved by a common impulse, seemed to be in motion. We do but speak guardedly when we say thousands left their ordinary employments to band themselves together for the pretended purpose of aiding the patriots, so called—a miserable faction arrayed in open hostility to the constituted authorities of Canada. Secret societies were formed, called Hunter's Lodges, and a shibboleth prescribed whereby the initiate might be better known and recognized; the arsenals were plundered to furnish arms and munition; and men bearing the title of *Honorable* were found with rifles upon their shoulders, leading the masses and directing their energies. The peace of the nation was in jeopardy, and to prevent the avalanche of banded fanatics from precipitating itself into the province of Canada the neutrality act was passed, and not passed one moment too soon. Mr. Van Buren issued his proclamation, setting forth, clearly and forcibly, the illegality and bad faith of all such combinations, and

warning citizens of their errors. But, what was more forcible, the army was put in motion, and distinguished officers detailed for the service of persuading our own citizens to mind their own business, and refrain from personal interference with that of their peaceable neighbors.

A slight examination of the neutrality act will show that its general features were new and peculiar; that apparently it was drawn in haste, and its true construction not always the most easy; it was temporary in its duration, being limited to two years; it conferred new and extensive powers on the President; it required from its agents the performance of duties which necessarily brought them into collision with large classes of exasperated men, and interfered with ordinary business before that law considered lawful. The President was authorized to employ portions of the army and navy; to require the services of attorneys, marshals, and collectors, and such others as he chose to appoint, in the performance of acts not before pointed out in the ordinary laws of the country. The act made no provision for any compensation for the services of such collectors, marshals, &c.; it made no distinct provision for the safe-keeping of the property detained, nor for its final disposition.

This specification is not intended as a criticism upon the propriety of the act; quite the reverse, but merely to show that the exigency of the times demanded a special act, with new and unusual powers, and we accord to Congress great credit for its energy and decision, in an appropriate and practical form.

The neutrality act, according to its legal effect, was a high commission from the people to its President, for a great national purpose. It conferred upon him plenary power to effect the object. Each and every one of the officers or persons detailed for service, whether by the President directly or by him indirectly, through others, became, and were in law, the agents of the government for the performance of the duty thus required of them, in the same manner and to the same extent that the President was. The President was the principal and all others his deputies.

The case, then, when reduced to its last analysis, is simply this: the government requires the collector to perform a specific duty, and he performs it. We insist that a contract of indemnity against the consequences of the act is the natural and legal result.

This would be the result in a like case between individuals, provided the service was lawful, much more so when the principal party is the government, and the act not only lawful but national, to preserve the peace of the country. A prominent individual who should command his servant to perform an act, apparently legal—as to remove an obstruction from a highway—and should refuse to indemnify the servant from the consequences of a suit against him for doing the act, would not gain a very enviable reputation. We do not feel at liberty to pursue the subject, for by so doing an inference may be drawn, which we do not feel, that the government may hesitate in granting the indemnity. We take pleasure in asserting a positive conviction that it will be the pleasure of the government to indemnify all their agents in the right performance of their several duties.

There is not only an apparent justice and propriety in such a course, but there is a strong ground of political expediency for it. Faithfulness is a noble plant, but an occasional genial watering may give it a more perfect growth and riper fruits, and unfortunately is not so common as to render protection unnecessary. There are times when patriotic men, faithful officers, have occasion for energy, decision and courage in the discharge of a difficult duty. It was most emphatically so in the commotions on the frontier in 1838. If the events of that day should ever be graphically written, they will disclose the fact that the firmness of Generals Scott and Wool was severely taxed. We know that General Wool was more than once surrounded by infuriated men, who considered him an obstacle in the way of their plans, and that by his firmness and decision they were overawed. We know that the public prints echoed the ebullitions of rage, finding vent in the declaration that men who would not submit to their plans *were the enemies of the country, fit only for the gibbet, and should be confined there until the ravens picked the flesh from their bones.* It is a pleasure to turn from such dismal pictures to the decision of Chief Justice Redfield, in the case of Stoughton *vs.* Mott, and learn the faithfulness of the petitioner in the duties assigned him.

If there is a weak spot in our government, it arises from the impulsive character of our citizens. The best qualities, when perverted, become positive evils. The feelings of genuine patriotism may be so excited by the false glare of a fancied philanthropy, that the subjects of it, at times, may become the most practical enemies of order and law. It was eminently so in 1838. Whether the same exists now, it is not our business to inquire. But this we do say, that when it becomes necessary to enact new laws, to provide new remedies, and require difficult services, it would be unjust, as well as impolitic, for a powerful and wealthy republic to leave their agents, after performing faithfully the services demanded of them, to bear the expenses of litigation consequent upon their performance of duty, and refuse indemnity for their time, labor and expenditures. The thing is morally impossible. We feel assured it will be the pleasure of the government to award full indemnity to its faithful officers.

The petitioner begs leave to refer the court to the opinion of the circuit court, in the case of Stoughton *vs.* Dimick; and, as the opinion may not be found in any printed volume, he subjoins a copy, kindly furnished by the learned district judge, the late honorable Samuel Prentiss.

CIRCUIT COURT OF UNITED STATES, DISTRICT OF VERMONT, OCTOBER TERM, 1855.

DeClancy Stoughton *vs.* Justin Dimick.

In this case a verdict was returned for the plaintiff, with damages assessed on the issue joined upon the plea of not guilty; and for the defendant, upon the issue growing out of the statute of limitations.

The verdict was taken, subject to the opinion of the court on the law arising upon the facts found, and to stand, be altered or amended, and judgment rendered thereon, or set aside, and a new trial granted, according as that opinion might be. The facts and questions in the case will fully appear from the opinion delivered by the court.

O. Stevens, for plaintiff.

L. B. Peck, district attorney, for defendant.

Prentiss, justice.—This is an action of trover to recover the value of a vessel taken and detained by defendant, while acting in the capacity of a military officer, under the act of Congress, March 10, 1838, commonly called the Neutrality Act.

Two questions arise in the case:

1. Whether the defendant had authority to take and detain the vessel.

2. Whether the action is barred by the statute of limitations.

Admitting that no officer but such as is named in the first section of the act, collector, naval officer, surveyor, inspector of customs, marshal, deputy marshal, or other officer, specially appointed by the President for that purpose, could make a seizure, properly speaking, under the act; or, in other words, could take property for the purpose of holding and proceeding with it in the manner prescribed by the act—the question still remains, whether the defendant, by taking the vessel in question into his possession, under the circumstances, in the manner, and for the purpose he did, assumed an unauthorized power, and is consequently liable to the plaintiff for it.

By the eighth section of the act it was made lawful for the President, or such person as he might empower for that purpose, to employ such part of the land or naval force of the United States, or the militia, as should be necessary to prevent the violation, and to enforce the due execution of the act. Under instructions from the President, and pursuant to the powers thus given him, a military force, by orders issued by the Secretary of War, was placed at different points upon the northern frontier—at Niagara, at Sackett's Harbor, and at Plattsburg, upon Lake Champlain. The defendant was a captain in the army, stationed at the latter place, and was ordered by the commanding general of the station to take post with his company at Rouse's Point, on the lake near the frontier line, for the purposes mentioned in the act just referred to, with instructions faithfully to execute these purposes. Under the orders thus given him, and while stationed at the post so assigned him, the defendant, at Champlain, a post a short distance this side of the line, took possession of the vessel. The vessel was fastened to the dock, but was wrecked and destroyed the night of the same day, by a storm, so that it could no longer be a subject of detention, or redelivery, or of any proceeding under the act.

Though the destination of the vessel was only to Champlain, and it was not intended to pass the line, it had arms and munitions of war on board, which were intended to be taken across the line, though by another conveyance, to and for the use of the insurgents in Canada, then in arms, near the line. If the vessel itself, as the plaintiff would maintain, was not liable to seizure, not being, in fact, about to pass the frontier, the arms and munitions of war aboard of it, among which

were eight loads of fixed ammunition, clearly were so liable, and these could not be seized and secured without or otherwise than by arresting and taking possession of the vessel. And even supposing the military force, so far as concerns the seizure of property, was intended to act in aid of the civil authority, or rather of the civil officers mentioned in the first section of the act, and the commander of such force had not the power of seizure those officers had, he might at least, when necessary, take property as a precautionary measure to prevent an intended violation of the act, and detain the property until an officer having the power to seize and hold it for the purpose of proceeding with it in the manner directed might be procured and act in the matter. Without such power, how could the military force fully perform the duty assigned it or be effectually employed "to prevent the violation and to enforce the due execution of the act."

In this view, which is perhaps more limited and restricted than might be consistently taken, the defendant did not exceed the authority given him by the act, and as it does not appear that the loss of the vessel was the consequence of the want of ordinary care on his part, he cannot be liable for it.

(The second point, in relation to the statute of limitations, is omitted.)

Such being our opinion upon the several questions involved in the case, the defendant is entitled to judgment; and judgment must be entered up for him on the verdict accordingly.

The petitioner also asks leave to annex the following copy of a memorial by him forwarded immediately after the commencement of the suit against him, in connexion with the fact that the attorneys of the government attended and directed as to the suit.

To the Hon. Levi Woodbury, Secretary of the Treasury:

The memorial of Danford Mott, of Alburg, in the State of Vermont, shows: That for ten or more years last past, he has been a deputy collector of customs for the district of Vermont, and still is a deputy under Colonel A. W. Hyde, collector for said district of Vermont. That on the 7th of November, 1838, the memorialist was at Champlain, in the district of New York, and aided one of the officers of the customs there in the examination of a vessel loaded with munitions of war, which was subsequently seized; and as your memorialist has been involved in law suits growing out of the transaction, one of which is still pending in Grand Isle county court, he thinks it right and proper that the whole circumstances of the case should be laid before your department, for the information of the head of the department, and for such further use as circumstances may hereafter render it proper and just to make of them for the relief of your memorialist in the premises.

On the 7th of November, 1838, an engagement took place between what are familiarly called the patriots and a portion of the Canadian military force, within a few rods of the boundary line between the United States and Canada, about two miles from the collector's office, in the town of Champlain, on the west side of the lake.

While the guns were yet firing, this memorialist accompanied Captain Dimick, of the United States army, who was then in command of the troops at Champlain, and on nearing the line we met straggling parties fleeing from the place of the engagement into the United States, and took from them their arms, and searched the woods in that neighborhood and collected more arms, &c., that they had abandoned. On our return to the wharf we found the sloop General McComb had just come to within a few rods of the wharf, and as we could easily distinguish boxes and kegs on board having the appearance of ammunition, this memorialist, at the request of Captain Dimick, went, in company with Thomas Crook, who was then a deputy under Colonel McNiel, the collector of that district, to make examination. Your memorialist accordingly accompanied Mr. Crook and six soldiers, furnished by Captain Dimick; and as there was no boat save the one in the employment of your memorialist, he took his boat and men and carried Mr. Crook and the soldiers on board. Before we reached the sloop, all the men who had the charge of her took to their small boat and abandoned the sloop. When we got on board, we found that the load on board consisted of powder, balls, cartridges, &c., whereupon we returned and made report of the facts to Captain Dimick. Captain Dimick desired your memorialist to return and seize the sloop and cargo; but as Mr. Crook was present, your memorialist answered that he thought the execution of the order more appropriately belonged to him, and thereupon Captain Dimick requested Mr. Crook to go on board and make the seizure: and Mr. Crook went on board and seized the sloop and cargo and brought them to the wharf. On examination, it was found that the cargo consisted of 6 kegs of powder, 3 bags of musket balls, 5 kegs of cartridges, 4 kegs of six-pound shot, 16 boxes of six-pound shot, two swords, and two pistols.

The ammunition, &c., was put in charge of the officers of the customs for the New York district, and the proceedings had thereon will appear by the affidavit of Mr. Crook and the requisition of Colonel McNeil, copies of which are appended to this memorial. This memorialist had no further agency than as above stated, and never had any charge or custody of the sloop or munitions. A suit was immediately commenced against this memorialist by DeClancy Stoughton, claiming to be the owner of the sloop, declaring in trespass in two counts: in the first, for the seizure of the sloop; and in the second, for the munitions; but this second count has been withdrawn. The cause came on for trial before the Grand Isle county court, in September last, but the jury, after being out all night, could not agree and were discharged. The cause came on again for trial in March last, when a verdict was returned for the sloop, as estimated by the witnesses, and the cost. Your memorialist entered a review, by which the suit will be again in order for trial in September next.

It appeared on the trial that the vessel was loaded a few miles from the lines, and there was no secret as to the destination of the arms—that they were intended for the patriots; but the witnesses swore that the sloop was not to pass the lines, but land the ammunition at some convenient place near the line. It appeared on the other side

that the sloop was standing directly before the wind for the line, and came to on a signal being made from the shore, and cast anchor near the wharf, distant less than two miles from the line.

If a recovery is had against your memorialist, it must be on one of two grounds:

1. That the sloop is not liable to seizure, unless there was an intention to take it across the line.

2. That though the arms and ammunition were to be taken across the line, the sloop is not liable, unless to be used in transporting them across the line.

It was proved by the testimony of Crook and the deposition of Captain Dimick that the seizure was in fact made by Crook, and not by your memorialist; but your memorialist labors under all possible disadvantages from the feeling that continues to prevail on the line in favor of the patriots, and the utter impossibility of a fair trial in any case where the patriot feeling is brought to bear. If this prejudice shall lead the jury to say that your memorialist was concerned in the seizure, on the ground that he went on board with Crook to make the examination, it will then rest on the inquiry, whether the defendant can be justified by the act of March 10, 1838. Without stopping to inquire as to the judicial meaning of the words in the second section, justifying the seizure of the vessel, arms, &c., *about to pass the frontier*, it will be sufficient to say that the circumstances in favor of the seizure are as strong as any case can possibly be, unless the vessel is found in the act of crossing the line. It was known, when the vessel was loaded, that an engagement was expected, and the leaders of the patriots sent expresses for the arms, ammunition, &c.; the sloop proceeded directly towards the line and rounded to at a short distance from it on raising a signal from the shore. Under such circumstances, the identical case, intended to be provided for by the act, had occurred, and the duty to seize was imperative; and if in the end the act will not protect, it must arise from the peculiar phraseology of the act.

Your memorialist will continue to defend the suit, and spare no pains to make the defence available; but if, in the end, he shall be beaten, he cannot but think that he will have a fair claim for relief, and that Congress will award it to him. In the mean time, your memorialist thinks it right that the proper department should be advised of all the circumstances, so that if any suggestions or directions may be thought necessary they may be given; and your memorialist will be most happy to be availed of them, and follow them.

Your memorialist ought also to state that a suit has been brought against him by H. J. Thomas, the editor of the "North American," for one of the swords, and a recovery had for thirty-four dollars sixty-five cents damages and cost, which he has paid; and that, in the defence of the suit, your memorialist has incurred great expense, which is not less than sixty dollars more. The suit was brought before a justice, and his decision was conclusive, as the suit was not open to re-examination or review.

DANFORD MOTT.

BURLINGTON, *Vermont, July* 15, 1840.

It may not be improper to add that, agreeably to the request in the foregoing memorial, at the succeeding term of the court Hon. Daniel Kellogg, district attorney, attended, and by his advice a motion was filed to dismiss the suit for want of jurisdiction, and the court dismissed the suit, the result of which is stated in the petition.

"A public officer invested with certain discretionary powers never has been, and never should be, made answerable for any injury when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty."—(Opinion of Justice Woodbury, Wilkes *vs.* Dinsman, 7 Howard, S. C. Reports, page 129.)

"Hence, while an officer acts within the limits of this discretion, the same law which gives to him will protect him in the exercise of it."—(Ib., page 130.)

"In very few instances is an officer answerable for what he does to the best of his judgment in cases where he is compelled to act."—(Ib., page 130; also see 12 Howard, page 390.)

See U. S. Statutes at Large, volume 6, pages 515, 438, 373, expenses in defending suit.

See special act, Charles Richmond, compensation for services as assistant marshal during Canadian disturbances in 1839, 30th Congress, 1st session, August 14, 1848.

Agency.

"So an agent may recover of his principal damages sustained in defending a suit in the principal's behalf, if the agent was acting within the scope of his authority, and that loss arose from the fact of agency, and without any fault or laches on the agent's part."—(Story on Agency, page 417, sec. 339.)

"The law will imply a promise on the part of the principal to indemnify him."—(Ib., page 418.)

"Not only may the advances and disbursements of an agent, made out of his own funds, be clained from the principal, when they properly flow from his agency, but he will also be entitled to interest upon such advances and disbursements."—(Story on Agency, page 416, sec. 338.)

"A ratification once deliberately made, with a full knowledge of all the material circumstances, cannot be recalled."—(Ib., page 285, sec. 242.)

C. K. AVERILL,
Attorney for Claimant.

IN THE COURT OF CLAIMS.

No. 1620.

DANFORD MOTT *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

The petitioner was sued for the part he had taken in the seizure of a certain sloop about to pass the frontier with arms in violation of the act of March 10, 1838.

He applied to the department, and the successive district attorneys were instructed to, and did, appear and defend the suit.

The petitioner, however, employed additional counsel, and incurred sundry expenses in preparations for his defence.

The points made for the United States are:

1. The government having assumed the defence of the suit, no request to the petitioner to defend can be implied. There was no express request. In the absence of any such request, the petitioner cannot recover costs.—(Spurrier *vs.* Eldeton, 5 Esp., 1.)

2. At the utmost the petitioner could only recover his taxed costs, and the claim is for expenses beyond and not including such costs.

3. The ground of action against the petitioner was, in fact, not for acts done as an agent of the United States, but for acts done after his authority as such agent had been exercised and exhausted.—(See Stoughton *vs.* Mott, 25 Vermont Rep., 668.) The damage to the petitioner cannot, therefore, be said to arise from his agency, and for none other can he claim indemnity.—(Darcy *vs.* Lyle, 5 Binney, 449, and remarks thereon in Livermore on Agency, chap. ix, sec. 2; Story on Agency, sec. 341.)

4. The government is not bound to indemnify its officers or agents against groundless suits for acts done in the regular discharge of their duties.—(See grounds of indemnity in Betts *vs.* Gibbins, 2 Ad. & El., 57; Frixione *vs.* Tagliaferro, 34 Eng. L. & E. Rep., 27; Adamson *vs.* Jarvis, 4 Bing., 66; also, 6 Shiepley, [18 Maine,] 79; 26 Alabama, 633.)

DAN'L RATCLIFFE,
Assistant Solicitor.

IN THE COURT OF CLAIMS.

April 2, 1860.

DANFORD MOTT *vs.* THE UNITED STATES.

HUGHES, J., delivered the opinion of the court.

The claimant was the deputy collector of customs for the district of Vermont on the 7th day of November, 1838, when the transaction on which his claim is founded took place, and for some time before and since held that office and discharged its duties. The civil commotions

then existing in Canada, commonly called the "Patriot war," had arrayed a portion of the people of that province in arms against their government, and the citizens of the United States along the border sympathized with the insurgents and furnished them aid in men and munitions of war. Congress, by the act of March 10, 1838, prohibited the interference of the people of the United States in the civil war in Canada, and both the President and the governor of Vermont issued their proclamations, respectively, enjoining upon the citizens of the United States obedience to the law.

A vessel called the *General McComb*, belonging to *DeClancy Stoughton*, and laden with arms for the rebels in Canada, was seized at Rouse's Point, on Lake Champlain, by the officers of the United States army stationed at that point, and the arms taken out of the vessel. The vessel itself was moored near the landing, in charge of the government troops, and during the night a violent gale of wind cast it ashore and wrecked it. The claimant in this case, in his capacity of deputy collector of Vermont, at the request of the officers of the army, and in pursuance of his official duty, had, to some extent, participated in the seizure of the vessel. For this, *Stoughton*, the owner of the vessel, sued him in the State court of Vermont, and a long and bitterly contested lawsuit ensued. The suit began in 1839 and ended in 1856. It was taken to the supreme court of the State four times, and there were several trials by jury in the inferior court. The several decisions of the supreme court in the cause are reported in the 13th, 15th, and 25th volumes Vermont Reports. The popular feeling was much inflamed against the claimant, and a law in aid of the prosecution was enacted by the legislature of Vermont. The suit, however, finally resulted in a judgment in favor of the defendant, who is the claimant in this case. In defending this suit for seventeen years, in the inferior and superior courts of the State of Vermont, the claimant employed two lawyers, Messrs. Charles Adams and H. R. Beardsley. Upon their application, the district attorneys of the United States, in office during the pendency of the litigation, by direction of the proper department, rendered their professional assistance. The government also, upon the application of the claimant, ordered certain army officers, cognizant of the facts attending the seizure of the vessel, to attend the trial and give evidence. Upon the termination of the suit, *Mott*, the claimant, by his petition in this case, made a claim upon the government for indemnity for his expenses and time in defending the suit brought against him for the discharge of his official duty as an officer of the government, in enforcing the act of Congress, and aiding in the seizure and detention of the *General McComb*, while employed in transporting arms to the insurgents in Canada. He claims the amount of costs taxed in his favor, and for which he recovered judgment in the State court, but which he has been unable to collect, by reason of the insolvency of the plaintiff in the action. He claims, also, the amount of fees paid his counsel, and compensation for his time and expenses in giving his personal attention to the suit and procuring testimony. A bill of particulars of these several matters is in the record, amounting in the aggregate to $2,829 92, which is the extent of the claimant's demand. Of this sum, $1,505 28 is for counsel fees paid and assumed

to Messrs. Ádams, Beardsley, and Brown, of whose respective accounts particular statements are given in the record, and proved by the evidence of the two former. The remaining $1,324 64 is for costs recovered in the State court, expenditures and personal services, in and about his defence, as set out in the bill of particulars.

On the part of the United States, it is insisted—1st. That the government having, by directing the district attorneys to aid in the defence of the suit against Mott, assumed the management of it, no further charge for counsel fees ought to be allowed. 2d. That the utmost the claimant is entitled to recover is the amount of his costs taxed in the State court. 3d. That the suit against Mott was for acts done after his authority as the agent of the government had ceased, and not for acts done within the sphere of his duty. 4th. That the government is not liable to indemnify its officers.

The first question to be disposed of is, whether the United States are at all liable to indemnify officers for expenditures incurred in the defence of suits brought against them for acts done in the discharge of their official duties? As an original proposition, we are much inclined to doubt the liability of the government in cases of this kind upon strict principles of law. But the action of the government, under the advice of the Attorney General, seems in favor of such liability.

In some instances, the government has authorized the employment of counsel in advance; in others, it has indemnified its officers after litigation was ended.—(Opinions of Attorneys Gen., vol. 6, page 220; Little et al. *vs.* Barreme et al., 2d Cranch, 170.) Congress has also recognized the justice of the principle in question by the act of August 31, 1852, ch. 108, sec. 11, which provides "that where the ministerial officers of the United States have or shall incur extraordinary expense in executing the laws thereof, the payment of which is not specifically provided for, the President of the United States is authorized to allow the payment thereof, under the special taxation of the district or circuit court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary." Attorney General Cushing says that this statute is applicable to the defence of lawsuits, and is understood by him to have been so designed by Congress.—(Opinions, vol. 6, p. 223.)

In one case, (Little et al. *vs.* Barreme et al., cited above,) the United States assumed and paid a judgment, with interest and all charges, where, by the judgment of the court, the acts of the officer had been held illegal; with how much better reason may they be held liable for indemnity, where a State supreme court, after a most searching inquiry, has solemnly decided that the conduct of their officer was strictly in the execution of his duty? But it is denied in this case, by the counsel for the government, that *Mott*, the claimant, was acting within the sphere of his duty in the part he took towards the capture and detention of the General McComb.

If the United States can make such an objection, after their adoption of the claimant's suit, by sending the district attorneys to defend it, it is sufficiently answered, in our opinion, by the judgment of the supreme court of Vermont, given, we may remark, upon the very same

evidence now before us—(the bill of exceptions.) Chief Justice Redfield observes upon this point as follows:

"So that, in every view of the defendant's conduct, on the evidence detailed in the exceptions, it seems impossible to implicate the defendant beyond his mere agency in seizing and unloading the arms and munitions of war, which were expressly forfeited by the act of Congress, and which, of course, under the circumstances, it was made the imperious duty of the defendant to seize and detain, and which, to have evaded at the time, would have been justly regarded not only a dereliction of duty, at all times disgraceful, but, in that particular emergency, a cowardly and dastardly instance of treachery and self-seeking at the expense of his official oath and obligation, which all fair-minded men would not fail to regard as far more disastrous than any pecuniary loss or embarrassment which could possibly fall upon him, and more to be deprecated by an honorable mind than even the loss of life in the reasonable and prudent defence of one's country or its laws. And, lastly, these very munitions of war, which, in the first instance, were included in this suit, are now abandoned by the plaintiff himself as a hopeless pursuit; thus virtually confessing that all which the defendant is shown to have done was done with propriety, as a matter of duty and necessity."

From the evidence in the case, we are fully satisfied that Mott was sued for acts done in the faithful discharge of his duty as an officer, and he appears to have been successfully defended in the State court upon that ground.

In a recent instance the Attorney General of the United States held the United States liable in such a case; and it was acted on by the government, as appears from the copy of the Attorney General's opinion and letter of the Fourth Auditor, given below:

ATTORNEY GENERAL'S OFFICE.
July, 14, 1857.

SIR: Captain Wilkes, while in command of the Exploring Expedition, caused one of his men to be punished for disobedience of orders. After his return the man brought an action of trespass against Captain Wilkes, which, after several trials, was abandoned by the plaintiff.

I consider the decision of the Supreme Court, and the final termination of the cause, under an opinion given by that tribunal, as establishing fully that the orders disobeyed by the plaintiff were the lawful orders of his superior officer, and that the punishment for such disobedience was inflicted by Captain Wilkes in the discharge of his proper duty.

Captain Wilkes suffered seriously by this litigation; for, though it was finally determined in his favor, his defence put him to a heavy expense, besides the trouble and vexation of it. He now demands that the government will reimburse those expenses; and you ask whether, in my opinion, his claim is valid.

When an officer of the United States is sued for doing what he was required to do by law, or by the special orders of the government, he ought to be defended by the government. This is required by the plain principles of justice, as well as by sound policy. No man of common

prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits, which he must carry on at his own expense. For this reason it has been the uniform practice of the federal government, ever since its foundation, to take upon itself the defence of its officers who are sued or prosecuted for executing its laws.

In Little *vs.* Barems, 2 Cr., 170, the government took no part in the defence, but it afterwards assumed the judgment and paid it, with interest and all charges.

If an officer sued for doing his duty carries on his own defence, without appealing to the government for aid during the pendency of the cause, I think he has a just claim, after it is determined, to be placed in as good a condition as he would have been if the government had taken the defence on itself; in other words, to be repaid the sum he is out of pocket. Of course, he is not to be allowed any unreasonable or extravagant expenses.

I see no reason why Captain Wilkes should not have what he asks.

I am, most respectfully, yours, &c.,

J. S. BLACK.

Hon. ISAAC TOUCEY,
Secretary of the Navy.

ATTORNEY GENERAL'S OFFICE,
April 2, 1859.

The above is a true copy of the original in this office.

A. ROANE, *Clerk.*

Letter of Fourth Auditor.

TREASURY DEPARTMENT,
Fourth Auditor's Office, July 24, 1857.

SIR: Herewith you will receive a certificate for $2,129 75, payable by the navy agent at Washington, which sum is the amount due on account of costs, counsel's fees, &c., in a suit at law brought against you for acts done in an official capacity.

Very respectfully, your obedient servant,

A. O. DAYTON.

Captain CHARLES WILKES,
United States Navy, Washington City.

A true copy.

A. J. O'BANNON,
Fourth Auditor.

Regarding the foregoing as evidence of a "regulation of an executive department," upon which the law allows a claim to be founded, and without affirming the general rule of government liability in this class of cases, we think the facts of this particular case clearly entitle the claimant to relief.

Assuming, therefore, in this case, the liability of the United States for reasonable compensation, we direct our attention to the facts in evidence to determine the measure of that compensation. We cannot agree that, because the government, on the application of Mott's counsel, furnished the aid of the district attorneys, it thereby denied its liability for counsel fees; but, on the contrary; we regard that act as tending to show the obligation which the government acknowledged to protect the collector by all appropriate means. We are of opinion that the United States neither expressly agreed to indemnify the claimant, nor refused to do so, pending the litigation, but left him to make his defence at his own charge, with no previous assurance of indemnity—in itself a strong circumstance to disprove the needless expenditure of money by the claimant. The case, therefore, stands upon its intrinsic merits and the application of the rule laid down by the Attorney General.

Were the expenses incurred by Mott reasonable expenses? This may be tested by considering whether he acted as prudent men of business would act in the management of their own affairs. As to the number of counsel employed, he engaged two, (with a fee of thirty dollars to Brown for special services,) and the aid of the district attorney was added, by order of the government.

When the character of the suit is considered, the number of trials, the length of time during which the litigation lasted, and the determined spirit of the prosecution, it seems not unreasonable that the claimant should engage counsel of his own choice, familiar with the local influences, accessible at all times for purposes of consultation, and of sufficient number to protect him against the accidents of unforeseen absence or disability on the part of one, and to secure the benefits of a proper division of labor. Two counsel were not, in our opinion, too many. The charges of these gentlemen seem to be reasonable, and are proved to be so by their depositions.

The residue of the claimant's account, as stated in the bill of particulars, is reasonable enough in itself, and, except a charge of twenty-two dollars for expenses of printing in this cause, is, we think, sufficiently proved by the depositions of Mr. Adams, the vouchers filed, and the certificate of the clerk. The charge for printing we think should be disallowed, even if proved. In the deposition of Mr. Adams, (page 40 of the record,) it is stated that one hundred dollars of the costs recovered by the claimant in the State court could have been collected with proper diligence, and ought to be remitted; that amount, therefore, of the claimant's demand is not allowed.

The account of the claimant is supported by his own oath, which, it is stated in the record, (pp. 14 to 20,) was taken by consent. But, as the assistant solicitor explains his agreement upon that subject, we have thought it proper to leave that evidence out of the case. We find that the claimant is entitled to recover *twenty-seven hundred and seven dollars and ninety-two cents*, and a bill will be reported accordingly.

indemnify their officers and servants while acting in the proper discharge of their *duties* as *officers* of the government," it would by no means follow that they were legally bound to indemnify every citizen who might be sued for an act done by him in aid of the law, and which he was free to do, to limit or decline doing altogether, at his pleasure. The two cases are entirely different. Where an officer is sued for an act done in the line of his official duty, *i. e.*, "for doing what he was required to do by law," he has no option in the matter; he is merely the instrument, and the act is in fact the act of the United States, and there is a manifest equity in their assuming its consequences and holding the officer harmless, and all the motives of policy detailed by Attorney General Black (pp. 44, 45) attach to the case. But where a citizen is sued for an act volunteered by him in aid of the law, there is neither the same equity arising from the relation of the parties, nor any ground for the same considerations. His case may, from the importance of his services, or the circumstances in which they were rendered, commend itself to that liberal consideration of Congress which makes a part of national policy, and of which Congress is to judge; but I think it cannot make that contract of legal obligation on the United States, which the statute constituting this court commits to its jurisdiction.

If there is no such legal obligation and implied contract on the part of the United States, as the petitioner claims, he must, to charge them, show an authority from them to him to do the acts, and make the expenditures for which he claims. The evidence shows that upon the application of the petitioner, the Department of State intervened for the United States in the defence of this suit so far as to direct the attendance of two military officers as witnesses, and to appoint to the defence of the suit its proper legal officers—the successive district attorneys of that district; and these are to be presumed qualified for their task by their professional ability and local knowledge and relations. And it is entirely clear that the employment of other counsel, and all the action of the petitioner in this case, on which his claim is founded, was without authority from the department and on his own motion merely.

Mr. Charles Adams, one of the counsel employed by the petitioner, says: "I procured an order from the department at Washington for the attendance of Col. Dimmick and Dr. Hitchcock, and they attended and testified, and I suppose were paid by the government."—(P. 30.)

The petitioner says: "The successive administrations at Washington have kindly sent the successive district attorneys to aid in the defence. Hon. Daniel Kellogg, Hon. Abel Underwood, Charles Linsley, esq., and Lucius B. Peck, esq., have each been in attendance and lent their aid; but *still your petitioner thought* it indispensable to employ other counsel, and for that purpose he employed H. R. Beardsley, of St. Albans, and Charles Adams, of Burlington."—(P. 13.)

And as to the authority from the United States for this employment of counsel and the other action of the petitioner for which he now claims, the record exhibits this evidence from the department in a letter addressed to the petitioner's counsel:

DEPARTMENT OF STATE,
Washington, March 25, 1858.

SIR: Your letter of yesterday, with the papers relative to the claim of Danford Mott, for services in a suit relative to the seizure of the sloop General Macomb, in 1838, has been received. In reply, I have to inform you that as those services do not appear to have been rendered, or those expenses incurred, pursuant to any instruction of, or authority from, this department, the department is not considered liable therefor. A compliance with your request that the account may be examined with a view to its approval, is also declined for this and other obvious considerations. The papers are, consequently, herewith returned.

I am, sir, your obedient servant,

LEWIS CASS.

The evidence seems to me positive and conclusive that the United States never authorized or adopted the action of the respondent; and as it was not obligatory on them to intervene in the defence of the suit, but was optional with them whether, and how far they would do so, I think the petitioner has not established the contract claimed in his petition, or any contract whatever.

I am of opinion the petitioner is not entitled to relief.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C.C. No. 254.

DANIEL NIPPES.

MAY 2, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States of America in Congress assembled.

The Court of Claims respectfully presents the following documents as the report in the case of

DANIEL NIPPES *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Evidence offered by the claimant, transmitted to the House of Representatives.
3. Evidence offered by the government, transmitted to the House of Representatives.
4. Claimant's brief.
5. United States Solicitor's brief.
6. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court at Washington, this first day of May, A. D. 1860.

SAM'L H. HUNTINGTON.
Chief Clerk Court of Claims.

To the honorable the Court of Claims:

The petition of Daniel Nippes, of the State of Pennsylvania, respectfully represents:

That previously to March 9, 1839, and up to that period, he had been employed by the government of the United States as a manufacturer of public arms, particularly the musket; that at that period he had on hand, to be completed for the United States, seven hundred

and sixty muskets. These consisted of what is (now) called "the old model musket," as distinct from what is termed "the new model musket," hereinafter particularly alluded to.

On the said 9th day of March, 1839, a letter was addressed to your petitioner by George Bomford, then colonel of ordnance, and proper agent of the United States in the premises, stating that, after the delivery of the seven hundred and sixty muskets then due from your petitioner, "there would be received from him, in addition, one thousand muskets of the present" (now old) "model, but that this would be the last order he would receive for muskets of that model." A new model, more complete and efficacious, but more difficult of construction, and more expensive, had been adopted. The offer in the same letter was communicated to your petitioner, that if his terms were acceptable to the Ordnance department, they would receive from him muskets of that model, and he was encouraged to prepare the necessary tools and to enter into said manufacture.

The government had commenced the manufacture of the new model musket at "Springfield armory," Massachusetts, and thither your petitioner was advised by the colonel of ordnance to go, as a suitable place where he could obtain the necessary information on the subject, "and be enabled to determine whether he would choose to go into the manufacture of arms on that model." There was no fixed time for this examination and determination; a reasonable time was of course intended. The said letter further says, that in case the petitioner should decide to go on with the said manufacture on terms acceptable to that department, your petitioner should be allowed "the use of a model musket by which to prepare the necessary tools as soon as he might desire it." And again, "the price of the new model will be regulated by the results of the national armories; it will probably not be less than fifteen dollars for the first year." This letter will be seen at length by reference to executive documents herewith filed as part of this petition, No. 65, 33d Congress, 1st session, (Senate,) page 3.

In a reasonable time your petitioner went to Springfield armory, made his examination, and fixed his determination. He accepted the offer of the government as contained in the aforesaid letter of Colonel Bomford; that is, he agreed to manufacture muskets according to the new model to any extent that might be required by the government, the price to be regulated by the results of the national armories; but requested that his contract might be made as large as any which had been granted to other manufacturers. He also desired that a model musket might be sent him, according to promise. The response of your petitioner to the offer of the government was accepted by it, and the promise given that the model should be sent to him, but its transmission was delayed.

On the 30th of July, 1840, the Hon. J. Fornance, member of Congress from Pennsylvania, acting by the authority and in behalf of your petitioner, addressed an urgent letter to the Secretary of War, requesting that "the model" might be sent to your petitioner, and that he might be allowed a reasonable contract. On the 1st of August, 1840, that letter was replied to by Lieutenant Colonel G. Tal-

cott, of the Ordnance department. In it Mr. Fornance was informed that "the order to the superintendent of Harper's Ferry to send a model musket to Mr. Nippes, had this day been *reiterated.* As it regards the number of muskets to be made by Mr. Nippes, it has not been settled further than to assure him that he shall be allowed eight hundred." On the 27th day of August, 1840, Mr. Fornance is again compelled to write for the model musket, and is assured that there is every reason to believe that it will be prepared and forwarded as soon as possible. These letters are continued until toward the latter part of September, 1840, when the model musket was received by your petitioner. During all this time your petitioner and his employees were idle, and great expense was incurred by him without remuneration. These letters will be found in the above documents, from the 6th to the 13th page, inclusive. In answer to an inquiry whether by eight hundred muskets, mentioned in his letter of August 1, 1840, Colonel Talcott meant eight hundred altogether or eight hundred annually, Colonel Talcott replies: "That it had always been the intention of the department to give your petitioner a contract for eight hundred muskets a year for five years, with liberty to the government to increase the number on giving suitable notice;" thus giving to his letter of August 1, 1840, the definite meaning of eight hundred muskets per annum. Still your petitioner thought it would be best to have a formal agreement in his case, and he applied through his agent, Mr. Fornance, to Lieutenant Colonel Talcott for a conditional contract containing all that the letters of the said Talcott contained of engagements on the part of the government. To this letter Lieutenant Colonel Talcott replied, on the 11th of December, 1840. He assures Mr. Fornace "that there is no hazard or difficulty in the case; that Mr. Nippes" (your petitioner) "may safely rely on the letters from this office, and if he complies with what pertains to his share of the business, he may depend on having a contract. It is not usual," he continues, "to make conditional agreements in any other way than that which has been followed in his case, and he may be assured of its security in any event that can possibly occur." These two letters may be seen on the 15th page of the said documents.

The conditional agreement, therefore, of your petitioner with the government was thus formed. He undertook to supply the government with eight hundred model muskets per annum, in all four thousand, and the government agreed to pay for them a price which should be regulated by the results of the national armories. Is was conditional, because the price was not positively fixed, but made dependent upon certain results.

Before this conditional agreement was formed, to wit, on the 26th of February, 1840, the Secretary of War had entered into a formal contract with an individual by the name of Lemuel Pomeroy, for the manufacture of 6,000 model muskets, deliverable in five years, by instalments of 1,200 each. The contract in this case was adopted as a model contract. Your petitioner is prepared to prove that, *mutatis mutandis*, it was in form and substance adopted in all cases of contract for the manufacture of the model musket; but especially will he also be able to prove that in his case a contract precisely similar, *mutatis*

mutandis, was drawn up by direction of the lieutenant colonel of ordnance, submitted to your petitioner, and approved by him. It was ready, and about to be signed by both of the contracting parties, when, at the instigation of the lieutenant colonel of ordnance, its signature was postponed. *He* expressed a desire to enlarge the contract of your petitioner as to the number of muskets to be manufactured by him, and declared his belief that a larger number would be given to your petitioner; when that should be the case the contract, including such increased number, could be finally signed. No other alteration was proposed, and that alteration was for the benefit of your petitioner. The contract thus written out has been lost or mislaid, but the aforementioned contract with Pomeroy, of which it was a copy, is extant. It will be seen, by reference to the documents herewith filed as a part of this petition, and already referred to, and on the third page thereof. The 4th article, being that which sets forth the obligations of the United States to the contractor, is in these words, viz:

"Fourth. It is agreed, &c., &c., that the United States shall pay to the said Lemuel Pomeroy $12 50 for each of said muskets complete. It is, however, provided that when the actual cost of manufacturing muskets at the public armories shall be satisfactorily ascertained, that then the said Lemuel Pomeroy shall be entitled to receive from the United States for each of the said 6,000 muskets the same sum which the actual cost of manufacturing a musket in the Springfield armory shall amount to, in lieu of the $12 50 aforesaid, the said average cost to be ascertained within two years from the date hereof; it being fully understood by the respective parties to this agreement, that the interest on the entire capital employed at the Springfield armory, insurance against all risk, with the addition of such further per centage for wear and decay as shall be sufficient to preserve said capital unimpaired, shall be charged as making a part of the cost of manufacturing arms at the United States armories."

In the 4th article of the said prepared agreement between your petitioner and the United States, nothing, he believes, was different but the name of the contractor and the number of the muskets: certain he is, nothing was different that would in the slightest degree vary the substance of the article. This article was but the embodiment of the agreement originally made between the Ordnance department and your petitioner, and fully carried out to a final consummation the assurance of Colonel Bomford, in his letter of March 9, 1839, to wit, "that the price of the muskets should be regulated by the results of the national armories."

Your petitioner immediately proceeded to the faithful performance of his part of the agreement. Owing to the new and complex character of "the model musket," requiring new tools and new and expensive machinery, and the delay of the model, it was more than one year before he was fully prepared to go on and continue in a proper and workmanlike manner, and to his complete satisfaction. He did succeed, however, in manufacturing and delivering 200 new model muskets by the 24th of January, 1842, and 300 more in June, 1842. No objection was made on account of the delay of this delivery, and he was afterwards, by a letter of Colonel Talcott, lieutenant colonel of ord-

nance, (and which may be seen on the 20th page of the Senate documents, above referred to and filed,) authorized to deliver the remaining 3,500 muskets within the years 1842, 1843, 1844, and 1845.

The 500 muskets delivered as aforesaid by your petitioner, were the test of his ability and skill in the manufacture of the model musket. They were inspected and highly approved by the proper officers of the government. Colonel Talcott himself, in a letter to the Secretary of War, July 15, 1842, (on the 18th page of said documents,) says: "In January last he" (your petitioner) "delivered the *two hundred* muskets, and the inspectors pronounced them equal in all respects to those made in any other place. These he refers to as the test of his ability to continue the work, and his right to receive more work from the United States. He acknowledges in the same letter the receipt of "three hundred more." For these muskets, at the time of the delivery of each parcel, respectively, your petitioner was paid the aforesaid conditional price of $12 50 per musket, with an addition of 25 cents per musket for appendages, making $12 75.

The period of two years had been fixed upon by the government in its contract with Pomeroy within which to ascertain by examinations at the Springfield armory the entire average cost of manufacturing the new model musket, according to the terms contained in the 4th article of said agreement, which average cost was according to the same article to be substituted for the conditional price aforesaid of $12 50. At the time when your petitioner delivered the above-mentioned 300 muskets, to wit, the 24th of June, 1842, four months over and above the said two years had elapsed, and still said average cost was not ascertained. Your petitioner was satisfied in his own mind, that owing to the small number of muskets per annum that he was allowed to manufacture and deliver, *that* average cost would by no means compensate him for the great expenses he had been compelled to undergo, and loss of time for more than a year, in preparing for his full operations, and the long space of time prescribed to him for the delivery of his muskets, and that it was more profitable for him to manufacture a large number of muskets per annum at a reduced price, than a very small number at the highest. With tools, machinery, and hands capable (as he avers) of manufacturing 1,800 muskets per annum, the honorable court will readily perceive, that he could manufacture that number at a far less rate than he could manufacture the limited number of 800 per annum. This they will the *more* readily perceive, when they are informed that the tools, machinery, and hands required for 800 muskets, would be sufficient for 1,800. The same rule governs in all branches of manufacture. A mill capable of grinding 60,000 barrels of flour per annum, can afford to take far less profit on that number than it can on 15,000 or 20,000. It was upon this principle that your petitioner acted when, on the 14th of July, 1842, in a letter to the honorable Secretary of War, (page 17 of the aforesaid documents,) he offered to manufacture and deliver 1,800 model muskets per annum for three years, at $14 50 per musket. That this would have been a better contract for your petitioner, and better, too, for the government than the one which he had made, he is prepared to prove. The letter of your petitioner was referred by the Secretary

of War to Lieut. Col. Talcott, who, on the next day, July 15, 1842, in a letter to the Secretary of War, reported against the application of your petitioner. But on the very next day, to wit, on the 16th of July, 1842, the said Talcott, taking advantage of the offer of your petitioner of $14 50 per musket for 1,800 muskets per annum, arbitrarily and unjustly ordered and established *that* as the price to be allowed your petitioner per musket for the 4,000 which he had contracted to make. How and when this was done your honors will see by reference to pages 18 and 19 of the said Senate executive documents in the letters of Lieut. Col. Talcott to the Secretary of War, and to W. B. Lewis, Esq., Second Auditor. There is no pretence on the part of the government that your petitioner ever agreed that this sum should be established as the full price of his musket; he solemnly denies that he ever so agreed, and he utterly denies the right of the government, *without* his consent, to establish for him in the premises any price less than that *agreed* upon by both parties; or on failure to establish any express agreement, then he denies the right of the government arbitrarily to fix for him any price less than a full and fair equivalent for his skill, work, and labor as a *quantum meruit*.

Your petitioner received the amount thus arbitrarily and unjustly ordered, because his wants were pressing, and it was vain for him to contend with power. He was, as many unfortunate creditors of the government before and since have been, compelled to yield to necessity, and to take what he could get. He did receive for the 500 muskets then delivered the said $14 50, or rather $2 per musket in addition to the $12 50 per musket which he had received, and he received the same price per musket for the remainder as they were delivered, amounting in all to 4,000 muskets. But he assures this honorable court that he would not have received it had he known the true state of the case and the important facts that have since come to his knowledge. Your petitioner now avers that he was grossly and fraudulently deceived by Lieutenant Colonel George Talcott, of the Ordnance, into that acceptance, and into his subsequent quiescence. At the time when the said Talcott arbitrarily established the said price for his muskets, your petitioner fully believed that the contract made on the 26th day of February, 1840, with Pomeroy was still subsisting, and that your petitioner was acting under it as well as Pomeroy. He *was not* told that that contract had been substituted by another between Pomeroy and the government on the 14th of March, 1842. The knowledge of this contract was in the bosom of Col. Talcott, and the contract itself was among the secret records of the Ordnance department. The said Talcott must have been—he was no doubt aware of the ignorance of your petitioner of the existence of this contract. Stranger as he was in Washington, your petitioner had no opportunity of knowing of its existence, much less its character; he could only know it when it should be given to the world in the published report of the War Department. It was not until early in 1847, your petitioner believes, that the report was published referring to the contract; at all events it was not until February, 1847, that it came to the knowledge of your petitioner, some time after he had completed the delivery of his 4,000 muskets, and received for them the arbitrary price "es-

tablished" by the lieutenant colonel of ordnance. This contract gives to Pomeroy $16 per musket for 2,100 muskets already delivered; for the remainder of his original 6,000 he was to receive $14 50 per musket. "It was further agreed that in consideration of the great expense incurred by the said Pomeroy in preparing tools and machinery suited to the manufacture of the new model muskets, and the limited number embraced in his said contract, the said parties of the first part do hereby extend the said number to 7,000 muskets and implements for the same; and the number of 1,000 now added to the said original contract, shall be delivered and received subject to all the rules of inspection, &c., but may be delivered by the said Pomeroy and spread, at his own option, throughout the time, viz: three years at his own option that his contract now has to run," &c., "and the said United States shall pay for each of the said 1,000 muskets $14 50." The said contract may be seen at length on the 16th page of the said Senate Ex. Doc. under the letter B.

Now your petitioner makes known unto your honors, that at the time when the said Talcott "established" the said $14 50 as the price of your petitioner's muskets, he was told by way of inducement or quietus, that that price had been fixed by Pomeroy and the said Talcott. He did not say that price had been fixed by a new contract with Pomeroy; that fact he concealed from your petitioner, and led him to believe that it had been fixed under the 4th article of the previous contract, and that it was the maximum cost of the model musket at the Springfield armory. He concealed the important fact that $16 per musket had been paid to Pomeroy for 2,100 muskets—more than one-half the number awarded to your petitioner, and not in the slightest degree superior to them in excellence or value; and he also concealed the important fact that, by way of inducement, Pomeroy was also allowed an additional number of 1,000, with permission to deliver these and all the rest (amounting in all to 4,900) over the short space of three years—terms much better than those prescribed in his first contract, and *far* better than those prescribed to your petitioner under any aspect of his case. Thus was your petitioner deceived into silence and quiescence for the space of four years. He submitted, however, with a full reservation of all his rights. But he humbly conceives that had he signed a receipt in full, or executed a release to the government, such an instrument would have been void under the fraudulent circumstances of the case. In this state of ignorance, therefore, and thus deceived, your petitioner went on to manufacture and deliver the remaining 3,500 of the 4,000 contracted for by him, until the whole were in the hands of the government. They were all regulary in inspected, accepted, and pronounced to be "of superior order." He received for these the above established sum of $14 50 per musket. to which was added 25 cents per musket for appendages.

He is prepared to prove that the actual cost of manufacturing the model musket at the Springfield armory during the two years intervening between the 26th of February, 1840, and the same period in 1842, referred to in the 4th article of Pomeroy's agreement, and the 4th article of your petitioner's unsigned agreement with the government, (particularly in 1840, the period of the commencement of the

manufacture of the said new musket,) was at least $18 50. In estimating this actual cost, your petitioner includes—

1st. The price of labor on each musket.

2d. All other labor, viz., the making and repairing of tools.

3d. The pay of officers.

4th. Cost of the materials fabricated.

5th. Interest on the entire capital employed, insurance against all risk, with the addition of such further per centage for wear and decay sufficient to preserve such capital unimpared. He therefore claims under the said express agreement, in addition to the $14 50 per musket already paid him, the sum of $4 per musket, making altogether $16,000.

Should this honorable court, however, entertain the opinion that the express agreement in this case covers only a part of his demand, to wit, the *conditional* price of $12 50, leaving the remainder to be decided by evidence upon *a quantum meruit* under an *implied contract*, or, should this honorable court be of opinion that there is no express contract in this case, but an implied contract which covers the whole price of the musket under a *quantum meruit*, in either of the said alternatives your petitioner is prepared to prove the actual cost of each model musket to him at his own manufactory to be $19 44, and the entire cost at the Springfield armory to be $18 50 per model musket—making your petitioner's claim, according to the first estimate, (of $19 44,) to be $4 94 per musket, and $19,760 for the whole 4,000 muskets; and according to the second estimate, (of $18 50,) to be $4 per musket, and $16,000 for the whole 4,000.

The model musket being an entirely new manufacture, the government was fully aware, not only that new machinery would be required but also, that that machinery would be highly expensive. Hence, in their contracts for its construction, they took into primary consideration, and made allowance for, the nature and character of such machinery, regarding even the interest on the capital invested, wear and tear, and insurance.

In other cases, where the article manufactured has long been known and used, and the machinery for making it has been long and universally in operation, the value of such article is established, with no apparent reference to the expense of the machinery or the difficulty of beginning a new operation. But where the machinery and the article are both of new and difficult construction, the expense of making the one necessarily makes a component part of the value of the other.

In February, 1847, your petitioner applied to the Hon. Wm. L. Marcy, then Secretary of War, to be placed on the same footing with the other manufacturers of the model musket, alleging that his expenses had far exceeded his profits. His application was rejected. He applied again in November, 1853, when the Hon. J. Davis was at the head of the War Department, and was again rejected. These applications, and the correspondence to which they led, may be seen by reference to the aforesaid Senate Executive Documents. He afterwards petitioned the 33d Congress of the United States, at its 2d session. His claim was considered in the Senate, and referred to the

Committee on Military Affairs, who, on the 15th of February, 1855, reported adversely.

The following he submits as a statement of his account.

1st. Under the alleged express contract for the whole work.

THE UNITED STATES

To Daniel Nippes, *Dr.*

To 4,000 model muskets delivered as follows:

In 1842.....	800	
In 1843.....	1,000	
In 1844.....	600	
In 1845.....	1,000	
In 1846.....	600 at $18 50 each,	$74,000

CR.

By cash received of the United States, being $14 50 on each musket.....	58,000
Balance due D. Nippes.....	16,000

Under an implied contract, in the absence of any express contract.

THE UNITED STATES

To Daniel Nippes, *Dr.*

To 4,000 muskets, at $19 44 each.....	$77,760

CR.

By cash received of the United States, being $14 50 on each musket.....	58,000
Balance due D. Nippes.....	19,760

And your petitioner as in duty bound will ever pray, &c.

STATE OF PENNSYLVANIA, *Montgomery county, sct.*

On this day of , A. D. eighteen hundred and fifty-seven, before the subscriber, a justice of the peace of the State of Pennsylvania, in and for Montgomery county, personally appears Daniel Nippes, and makes oath that the facts contained in the above petition are true, to the best of his knowledge and belief.

J. P.

33D CONG. 1ST SESS.—SENATE EX. DOC. No. 65.

Report of the Secretary of War.

WAR DEPARTMENT,
Washington, May 10, 1854.

SIR: As required by a resolution of the 20th ultimo I have the honor to submit herewith copies of all papers and vouchers on file in this department relative to the claim of Daniel Nippes.

Very respectfully, your obedient servant,

JEFFERSON DAVIS,
Secretary of War.

Hon. D. R. ATCHISON,
President of the Senate.

Colonel of Ordnance to D. Nippes.

ORDNANCE OFFICE,
Washington, March 9, 1839.

SIR: There will be received from you during the present year, on the usual terms, one thousand muskets of the present model, in addition to the seven hundred and sixty remaining to be delivered.

As this is the last order you will receive for muskets of this model, you will regulate your work accordingly.

At Springfield armory you can have an opportunity of examining the new model musket, and of obtaining the necessary information in relation to it, to enable you to determine whether you will choose to go into the manufacture of arms on that model. In case of your deciding to do so, on terms acceptable to this department, you will be allowed the use of a model musket to prepare the necessary tools, as soon as you may desire it. The price of the new model will be regulated by the results of the national armories; it will probably not be less than fifteen dollars for the first year.

It is proper to advise you that you must expect increased vigilance in the inspection of these arms, and also, that on account of the large stock of muskets on hand, and the increasing demands of the States for other arms and equipments, the orders for muskets will necessarily be diminished considerably in future.

Be pleased to let me hear from you on this subject as soon as convenient.

It must be understood that there is no obligation made on the part of the United States to pay for any part of the arms above ordered before the 1st of July next.

GEORGE BOMFORD,
Colonel of Ordnance.

Mr. D. NIPPES, *Philadelphia.*

No answer was received to this letter.

G. TALCOTT.

Contract with L. Pomeroy.

This agreement, made this 26th day of February, 1840, between George Talcott, lieutenant colonel of ordnance, in the service of the United States, acting with the consent and under the direction of the Hon Joel R. Poinsett, Secretary of War, of the one part, and Lemuel Pomeroy, of Pittsfield, State of Massachusetts, of the other part, witnesseth:

First. That the said Lemuel Pomeroy on his part has agreed, and doth hereby covenant and engage to manufacture and deliver, for the service of the United States, six thousand muskets with ramrods and flints complete, and that the said muskets shall be delivered in parcels of three hundred each, and at the rate of twelve hundred per year for five years, commencing with the 1st of January, 1840. It being, however, understood that if the said Lemuel Pomeroy shall fail to deliver the whole of said twelve hundred muskets in any one year, except the year 1840, he shall be allowed to make up the deficiency in the next succeeding year to an extent not exceeding three hundred. It is also agreed that the said Lemuel Pomeroy shall be furnished by the Ordnance department with a model or standard musket, such as is used for a pattern at the United States armories, and a box of muskets manufactured at the United States armory at Springfield as a standard of reference in relation to the execution of this contract, and that the said six thousand muskets shall, in all their parts, conform as nearly in model, size, and form, and be as nearly equal in workmanship and quality in every respect to the said model as the muskets contained in the said box so to be furnished are to the same.

Second. It is agreed that the said muskets shall be proved and inspected at the manufactory of the said Lemuel Pomeroy by an officer or person appointed by the chief of the Ordnance department for that purpose, and that the said muskets shall be subjected to and sustain the same rigor of proof to which muskets now manufactured at the national armory at Springfield are subjected. The expenses of proving and inspecting to be paid by the United States.

Third. It is further agreed that the said Lemuel Pomeroy shall cause the said muskets to be safely and properly packed for transportation in good and sufficient boxes, in the manner which is or may be prescribed by the Ordnance department and practiced at the national armories; each box to contain twenty muskets, twenty screw-drivers, twenty wipers, two ball screws, and two spring vices; and when so packed he shall cause the said muskets to be delivered at the United States arsenal, Watervleit, to such person as shall be appointed to receive the same. And that the said Lemuel Pomeroy shall be allowed by the United States for each and every screw-driver eight cents; for each and every wiper thirteen cents; for each and every ball screw fifteen cents; for each and every spring vice twenty-five cents; and a reasonable price for packing boxes and transportation of the arms aforesaid.

Fourth. It is agreed, and the said George Talcott in the capacity and acting with the consent and under the direction aforesaid, doth

hereby engage that the United States shall pay to the said Lemuel Pomeroy twelve dollars and a half for each of said muskets complete. It is, however, provided that when the actual cost of manufacturing muskets at the public armories shall be satisfactorily ascertained, that then the said Lemuel Pomeroy shall be entitled to receive from the United States, for each of the said six thousand muskets, the same sum which the actual cost of manufacturing a musket in the Springfield armory shall amount to, in lieu of the twelve dollars and a half aforesaid—the said average cost to be ascertained within two years from the date hereof; it being fully understood by the respective parties to this agreement that the interest on the entire capital employed at the Springfield armory, insurance against all risk, with the addition of such further per centage for wear and decay as shall be sufficient to preserve said capital unimpaired, shall be charged as making a part of the cost of manufacturing arms at the United States armories.

Fifth. It is agreed that payment for each parcel of three hundred muskets, with the ball screw, spring vices, boxes, &c., shall be made to the said Lemuel Pomeroy at the time of his delivering the same, as aforesaid, or as soon thereafter as may be.

Sixth. It is agreed that if the United States shall alter or modify the pattern or model musket, or establish a model or pattern differing in any respect from that upon which this agreement is founded, then the muskets to be thereafter manufactured under this agreement shall be made conformable thereto, if it be required by the chief of the Ordnance department; *Provided, however*, that the said Lemuel Pomeroy shall be allowed a reasonable compensation for any extra expense occasioned by such alteration, or shall be subject to a reasonable reduction of price, as the case may be; the amount of such compensation or reduction to be agreed upon and established before any alteration is made. No deviation from the established pattern will at any time be made, unless expressly directed, in writing, by the chief of the Ordnance department for the time being.

Seventh. It is agreed that the United States shall possess the right to declare this agreement null and void whenever the said Lemuel Pomeroy shall have failed to deliver, in any one year, four-fifths of the number of muskets, as herein stipulated, except the year 1840.

Eighth. It is further agreed that the United States shall be at liberty to increase the number of muskets to be manufactured and delivered as before stated, not exceeding in the whole two thousand five hundred per year, on giving the parties of the other part six months' notice of this increase, and payment therefor shall be made at the same rate and in the same manner as hereinbefore provided.

Ninth. It is expressly conditioned that no member of Congress is or shall be admitted to any share or part of this contract or agreement, or to any benefit to arise therefrom.

In witness whereof the parties aforesaid have hereunto set their hands and affixed their seals the day and year first above written.

G. TALCOTT, [SEAL.]
Lieut. Colonel of Ordnance.
L. POMEROY, [SEAL.]

Witnesses to the signature of Colonel Talcott—
WILLIAM C. REDDALL,
SAMUEL RAINEY.

Witnesses to the signature of L. Pomeroy—
JULIUS ROCKWELL,
THOMAS HASSARD, Jr.
Approved. J. R. P.

ORDNANCE OFFICE,
Washington, June 2, 1852.

I certify that the foregoing copy of a contract with L. Pomeroy, dated the 26th of February, 1840, is a correct copy from the record in this office.

A. K. CRAIG, *Colonel of Ordnance.*

D. Nippes to Hon. J. Fornance.

MILL CREEK, *May* 14, 1840.

DEAR SIR: Since I received your letter my brother has been at Washington. Colonel Talcott gave him an order to go to Harper's Ferry to get the limbs. He got the bayonet and the mounting; the lock has not yet come. It is now four weeks since my workmen are all idle, except two, and have been, some of them, these two months. We are now inspecting; as soon as that is through, which will be in a few days, all are done. Mr. Warner, the master armorer of Springfield armory, passed through Philadelphia yesterday. He informed me that ex-Governor Edwards was at Washington three weeks ago, and government gave him three thousand muskets to make of the old pattern. I wish you would please wait upon the Secretary of War personally and try to get ten or fifteen hundred for me to make of the old pattern, or more, if you can. Even if I had the model gun, it would take several months before we can get ready to go on; it won't do to be in idleness that long. By complying with this request and letting me know the result as soon as possible, you will very much oblige,

Yours respectfully,
DANIEL NIPPES.

Mr. JOSEPH FORNANCE.

Hon. J. Fornance to the Secretary of War.

MAY, 1840.

DEAR SIR: I send enclosed a letter from Mr. Nippes. I hope you will do me the favor to furnish me with an answer for Mr. Nippes as soon as convenient.

Respectfully, yours,
J. FORNANCE.

J. R. POINSETT, Esq., *Secretary of War.*

Secretary of War to Hon. J. Fornance.

WAR DEPARTMENT, *May* 20, 1840.

SIR: In answer to the letter of Mr. D. Nippes, enclosed in your note on the subject of his request to be furnished with a musket of the new model, and to be allowed to continue the manufacture of arms according to the old pattern, I have the honor to transmit you a report of the officer in charge of the Ordnance bureau, which is concurred in by the department.

J. R. POINSETT.

Hon. JOS. FORNANCE,
House of Representatives.

Hon. J. Fornance to D. Nippes.

May 21, 1840.

DEAR SIR: I obtained from the department an answer to your request, and as it is not as satisfactory as I could wish, I have it in writing from them, and send it as I received it.

It is the same answer I have at all times received, with the exception that they now promise, with some appearance of hope, that the model will be soon ready.

Accept my respects, and be assured that there is nothing that I shall not be pleased to do for you in this behalf at any time. And if the promise be not complied with shortly, please write.

Yours,

J. FORNANCE.

DANIEL NIPPES,
Merion square, Montgomery county, Pa.

Colonel of Ordnance to Secretary of War.

ORDNANCE OFFICE,
Washington, June 9, 1840.

SIR: The letter of the Hon. Mr. Fornance, concerning the application of Mr. Nippes to continue the manufacture of muskets of the old pattern, and grounding his claim on the report that three thousand muskets are to be made this year, of the old pattern, by the owners of the Whitneyville factory, is received, and in relation to this matter it is proper to state all the facts. The trustees of Whitney's estate are bound to deliver the armory, with everything in any way belonging to it, to the heir, a son, to whom it was devised, on his coming of age, which takes place in November, 1841. The property of Whitney, at the time of his decease, seventeen years ago, was supposed to be very large, and the particular part devised to the son did not much exceed what was left to each of the other heirs. By the failure of a bank, and

many changes in the value of personal property, the share of the other heirs is now very much reduced in value, and the trustees have considered it their duty not to reduce the amount still further by applying a portion of it to extend and increase the value of the armory. They therefore applied for authority to continue operations without changing patterns. Under this view of the case it was considered proper to permit them to manufacture muskets as heretofore, until November, 1841.

The muskets manufactured at Whitneyville are all made with machinery, and are acknowledged to be of the best quality, with a degree of uniformity in the parts that does not exist to such an extent elsewhere. Mr. Nippes has very little or no machinery, as will appear by the paper enclosed herewith, which is a copy of a report made to me by the former master armorer of the Springfield armory. It appears probable that Mr. Nippes does not intend to provide himself with much, if any, machinery, relying on hand-labor alone. This will suffice with regard to lock-making, if he possesses first rate workmen, but it cannot be extended to the mounting and finishing of arms, without the certainty of loss. How much his desire to continue working on the old model may be prompted by the fear of his inability to meet the requirements of the new model, is not for me to say. He has not yet made any contract for work of the new pattern, nor would he be safe in doing so, unless he is prepared to construct the necessary machinery.

I have not learned that he has yet made a beginning, and on referring to the condition of his several shops last year, it is questionable whether he really intends to incur the expense.

The letter of Mr. Fornance is returned herewith.

Very respectfully, I am, sir, your most obedient servant,

G. TALCOTT,
Lieutenant Colonel of Ordnance.

Hon. J. R. POINSETT,
Secretary of War.

Hon. J. Fornance to D. Nippes.

JUNE 11, 1840

DEAR SIR: I have endeavored to do something for you without effect. The Secretary says the favors shown to Whitney's estate was without his knowledge, and that he knew nothing of it until he has since called on Colonel Talcott for information, and altogether disapproves of it, though he intimates that there is more reason for it in Whitney's case than in yours.

Colonel Talcott has gone to some trouble to satisfy the Secretary, and among other things says, that the muskets manufactured at Whitneyville are all made with machinery, and are acknowledged to be of the best quality, with a degree of uniformity in the parts that does not exist to such an extent elsewhere. He tells the Secretary that

you have little or no machinery, and refers the Secretary to a letter from J. Weatherhead, an extract from which I send you enclosed.

He tells the Secretary that it appears that you do not intend to provide yourself with much, if any, machinery, relying on hand-labor alone. He says that hand-work may do for locks, with good workmen, but will not do for mounting and finishing of arms without certainty of loss.

He tells the Secretary that he has not learned that you have made a beginning of getting new machinery, and that on referring to the condition of your shops last year, he says it is questionable whether you intend to incur the expense.

He further mentioned that you had made no contract for work of the new pattern, and says it would not be safe for you to do so, unless you are prepared to construct the necessary machinery; and further suggests the probability that your desire to work on the old pattern may be prompted by the fear of your inability to meet the requirements of the new model. I have been particular in sending all of Colonel Talcott's reasons. I fear it shows rather an unfavorable disposition towards you.

Enclosed is the extract of a letter of which I have already spoken.

Yours,

J. FORNANCE.

Hon. J. Fornance to Secretary of War.

JUNE 20, 1840.

DEAR SIR: Your answer, together with Colonel Talcott's explanation, was duly received, extracts from which were sent by me to Mr. Nippes.

I have just received the enclosed from Mr. Nippes. How far it contradicts what is said by Colonel Talcott you will yourself perceive.

It appears, however, that Mr. Nippes has some fears that he is to have no work, whether he prepares or not. Please remove all doubts from his mind on that score.

His fears are not entirely groundless, for Colonel Talcott says he has not yet contracted. I think these are his words. I have not his letter by me.

With great respect, yours,

J. FORNANCE.

To J. R. POINSETT, Esq.,
Secretary of War.

Secretay of War to Hon. J. Fornance.

WAR DEPARTMENT, *July* 9, 1840.

SIR: I have the honor to transmit to you a report of the lieutenant colonel of ordnance, in answer to your two letters of the 20th ultimo

and 3d instant, relative to the contract which Mr. Nippes wishes to undertake for the manufacture of arms according to the new model.

J. R. POINSETT.

Hon. JOS. FORNANCE,
House of Representatives.

Hon. Jos. Fornance to Secretary of War.

JULY 30, 1840.

DEAR SIR: I have just written to Colonel Talcott relative to the model musket, and also relative to the quantity of arms that are to be allowed Mr. Nippes.

I do sincerely hope that the model will be sent on soon, and that Mr. Nippes will be allowed a reasonable contract. It is of some importance here; and, as I think it may be done without any loss or disadvantage to the government, I wish he may be permitted to have what he so earnestly solicits.

When Mr. Nippes was doing his work by hand, his work was admitted to be among the best. He has now been on to Springfield to get machinery and hands, and has returned much pleased with the improvements, and will, I have no doubt, do as much credit to himself with machinery as he did with hand labor.

With great respect, yours,

J. FORNANCE.

To J. R. POINSETT, Esq.,
Secretary of War.

Colonel of Ordnance to Hon. J. Fornance.

ORDNANCE OFFICE,
Washington, August 1, 1840.

SIR: Your letter of 30th ultimo, concerning the affairs of Mr. Nippes, is received, and in reply I have to state that the order for the superintendent of Harper's Ferry armory to send a model musket to Mr. Nippes has been this day reiterated. As regards the number of muskets to be made by Mr. Nippes, it has not been settled further than to assure him that he should be allowed eight hundred.

The great amount of arms other than muskets annually called for by the different States absorbs a large portion of the sum appropriated for arming the militia, and obliges us to reduce the expenditures for muskets.

It is not necessary for Mr. N. to visit this place.

I am, sir, respectfully,

G. TALCOTT,
Lieutenant Colonel of Ordnance.

Hon. J. FORNANCE,
Norristown, Pennsylvania.

Secretary of War to Hon. J. Fornance.

WAR DEPARTMENT, *August* 3, 1840.

SIR: I have the honor to refer you to the accompanying report of the lieutenant colonel of ordnance, in relation to the affairs of Mr. Nippes, in reply to your letter of the 30th ultimo.

Respectfully,

J. R. POINSETT.

Hon. J. FORNANCE,
Norristown, Pennsylvania.

Hon. J. Fornance to Colonel of Ordnance.

AUGUST 24, 1840.

DEAR SIR: Yours of the 1st of August was duly received, and the information it contained given to Mr. Nippes.

A few days ago Mr. Nippes called upon me and informed me that he had not received the model, and wished me again to remind you of the loss he must necessarily sustain by so much delay.

Let me again solicit your attention to this matter, and would hope that his contract might be raised to double what has been allotted to him, to compensate him for the entire loss of this summer.

Yours truly,

J. FORNANCE.

Colonel G. TALCOTT,
Ordnance Office.

Captain Symington to Hon. J. Fornance.

ORDNANCE OFFICE,
Washington, August 27, 1840.

SIR: Your letter of 24th August has been received.

From the tenor of the letter from this office to the superintendent of the Harper's Ferry armory, directing him to furnish a new model musket to Mr. Nippes, there is no reason to doubt that every exertion has been made to prepare and forward it as early as practicable.

I have the honor to be, sir, very respectfully, your obedient servant,

JOHN SYMINGTON,
Captain of Ordnance.

To the Hon. J. FORNANCE,
Norristown, Pennsylvania.

Hon. J. Fornance to Secretary of War.

SEPTEMBER 2, 1840.

DEAR SIR: Some three or four months ago I called with Nippes in the office of Colonel Talcott, where, in my presence, Colonel Talcott

told Mr. Nippes that he had ordered the superintendent at Harper's Ferry to send Mr. Nippes a model musket.

Since that I have received a letter signed by Colonel Talcott, stating that on the 1st of August he had reiterated the order to the superintendent at Harper's Ferry to send Nippes a model musket.

On the 27th of August, I received another letter, signed by Captain Symington, stating that the tenor of the letter from the office to the superintendent of the Harper's Ferry armory, directing him to furnish a new model musket to Mr. Nippes, is such that there is no reason to doubt that every exertion has been made to prepare and forward it.

Mr. Nippes also informs me, that long before the first period to which I have referred, Colonel Talcott promised to forward a model musket to him.

But to this time Mr. Nippes has received no model musket.

I write this hoping and soliciting a decisive answer, wishing to know, once for all, when Mr. Nippes may expect to get this model and be permitted to go to work. I am induced to take this part, believing that Mr. Nippes has been much injured by so great delay.

With great respect, yours,

J. FORNANCE.

To J. R. POINSETT, Esq.,
Secretary of War.

Captain Edward Lucas to Hon. J. Fornance.

SUPERINTENDENT'S OFFICE,
Harper's Ferry Armory, Va., September 7, 1840.

SIR: In reply to yours of the 2d instant, received yesterday, I have to state that Mr. Nippes came on with the order for the model musket himself, and received every assistance in our power, and was furnished at the time or shortly after with most of the parts of the gun. And had we supposed he was in any great want of the model, we would have forwarded him one of the first that were put together, though they were defective, and not such as Major Moor, the master armorer, would like to let go from the armory as models. I regret very much that Mr. Nippes should have suffered any inconvenience from the delay. One will be ready in the course of a week, and will be forwarded to him. Several alterations have been made since he was here, and we have had great difficulty in getting barrels and locks to please. Out of 100 barrels, five only were taken of the first pattern, and recently but one out of nine that were made for the present models answered.

Very respectfully, your most obedient servant,

EDWARD LUCAS, JR.,
Superintendent.

Hon. JOSEPH FORNANCE.

D. Nippes to Colonel of Ordnance.

LOWER MERION, *September* 16, 1840.

DEAR SIR: I have spent now about $1,000 in cash for the purpose of getting machinery proper for making the new model musket. I have also entered into contracts of different kinds making preparation for the completion of said contract, which will in a short time cost me several hundred dollars more, and am waiting now for the model and your order to proceed.

In this condition I have been astonished and mortified to hear that my brother William has been trying to injure me and prevent me from getting the contract. I now regret that I have gone to so much expense as I have in preparing machinery. But having expended and entered into contracts to the amount of near $1,500, all of which is lost to me if I do not get the contract, I am induced to make further inquiry into the matter.

I hear that my brother William has written you a letter; I understand that he boasts of having done so; I understand further that he tells you that the inspector was imposed on at the last inspection; that the arms turned in last winter were good for nothing; that the stocks were not seasoned, that they were kept in a damp room to make them pass, &c If he has written you such a letter, I will assure you that I am ignorant of ever committing such an offence, and must have been imposed on as much as the inspector. That the arms were kept in a damp room is, I think, untrue, as I can satisfy any one who will visit the room. I would like to have a copy of his letter if you would do me the favor to send me a copy.

I understand, also, that he says you told him that I was not to have any work until I got as much machinery as there is in the national armory, and then I was only to make 800, not 800 annually, but 800 altogether; that when I was ready, or thought myself so, you would send an inspector, and if I had not all the machinery I should have no work. Now, it is necessary for me to tell you that I cannot spend my money to get machinery to make 800 muskets; I understand 800 per year. The money I have already spent will not be returned in making 2,000 muskets.

I hear that my brother says that you complained because I got Mr. Fornance to interfere in my behalf. I did not think this a crime; Mr. Fornance was for many years a near neighbor and personal friend, and I would have thought hard if he had not shown some interest for me. My understanding always was, and it was confirmed by letters shown to me by Mr. Fornance, that I was to provide sufficient machinery to make all the mounting, &c., so it would shift better than those made by hand, that I should then have for certain 800 per year, and when I told you once 800 was too small, you said this was only nominal, and might be increased, or that amount.

Formerly my letters frequently came through my brother William; please answer this, directed to me, No. 174 Coates street, Philadelphia.

Respectfully, yours,

DANIEL NIPPES.

Colonel TALCOTT, *Ordnance Department.*

Hon. J. Fornance to Colonel of Ordnance.

NORRISTOWN, *September* 30, 1840.

DEAR SIR: Daniel Nippes is very uneasy, and is still continually calling upon me relative to his proposed contract. Every week or two he gets an opinion from something that somebody tells him, that you do not intend to give him that work, and that consequently he has expended $1,000 or more for nothing.

I wrote a long letter for him a week or two past, under his direction, requesting a copy of his brother's letter, &c.; to this he has received no answer, and this has caused new alarm.

I wish it could be within your power to send him on a written order to go to work, and then his mind will be at rest on the subject.

I expect to be at Washington next week, and if I can do anything I would be pleased to do it. I have no interest in the matter further than it is a neighbor makes the application.

Yours,

J. FORNANCE

G. TALCOTT, Esq.,
Colonel of Ordnance.

Hon. J. Fornance to Colonel of Ordnance.

NORRISTOWN, *October* 6, 1850.

DEAR SIR: I have received yours of the 3d. I think you misunderstood my last request; it was that you would send an order to Nippes to go to work; this would set his mind at rest; the model had been received by him before my last.

I will undertake to say for Mr. Nippes, that if you will give him orders to make 1,600 muskets, (which will be two years' work, as I formerly understood it, and as one year has now elapsed it would be nothing more than right,) of the new model; he will not ask the department for any more work, allowing him to proceed immediately with the machinery he now has procured; and that when the 1,600 are finished and passed, he will consider himself precluded from asking any further contract.

I ask this for Mr. Nippes, because it was my advice to him that induced him to spend the money he has spent in getting machinery.

He had some doubts in the beginning whether he would be safe in purchasing machinery without having first a contract by which he would be sure of having several years' employ.

I told him that from what you had said in my presence, together with your letters, I would think it safe for him to expend his money in getting machinery. This he says induced him to spend above $1,000. Now all I ask for him is one contract that will compensate him *some* for this expenditure, and then to end forever.

He tells me he has machinery to make the mounting, &c., agreeably to the new model. I do not know it to be so, but have his word

for it. I am sorry to trouble you so much, but am now induced because Nippes seems to reflect upon the inducement held out to him to expend his money.

Yours, respectfully,

J. FORNANCE.

Col. G. TALCOTT,
Ordnance Office.

Do me the favor to answer this soon. I expected to have visited Washington this week, but will not, I fear, be able to get there. Mr. Nippes, I believe, will willingly accept a contract on the above terms. His brother's conduct has been such that he desires to leave the business, if he can only be paid something for his machinery; so at least he informs me.

Colonel of Ordnance to Hon. J. Fornance.

ORDNANCE OFFICE,
Washington, October 8, 1840.

SIR: Your letter of the 6th instant has been received. It has been the intention of the department to give Mr. Nippes a contract for 800 muskets a year for five years, with liberty for the government to increase the number on giving suitable notice. The only difficulty has been to save Mr. Nippes from loss, and the United States from disappointment, by the rejection of his work, in case it does not come up to the required standing. If you feel assured of his skill and ability to execute the work according to the model, he may begin at once; but to prevent a great loss, an inspection will be made as soon as he has 200, or any less number, at his option, ready for examination; or, one of the master armorers of the United States may be ordered to make an inspection of the machinery and tools of Mr. Nippes at once, and report whether he will be able to fulfil a contract.

Respectfully, &c., &c.,

G. TALCOTT,
Lieutenant Colonel Ordnance.

Hon. J. FORNANCE,
Norristown, Pennsylvania.

Hon. J. Fornance to Colonel of Ordnance.

DECEMBER 9, 1840.

DEAR SIR: I am sorry to trouble you any more relative to Mr. Nippes's affairs, I feel assured you are already weary, from my continued importunity; but a new difficulty, in the mind of Mr. Nippes, has urged me to do so.

When you last wrote to me, I gave Mr. Nippes a copy of so much of your letter as was important to him to have. I also renewed my

opinion that the government would act fairly with him if he would complete two hundred muskets for inspection, and advised him at the same time to furnish himself with all necessary machinery before he commenced.

In compliance with this advice, Mr. Nippes made some additional preparaptions, and was about building, or at least enlarging his buildings, so that he might have all his machinery together. This, in part, together with other circumstances, Mr. Nippes informs me, will, in all probability, prevent him from having any ready for inspection before the 1st of April. Now Mr. Nippes's fears have been again alarmed by the result of the late election. He says he has no written contract, and if there should be new officers they may disregard all the labor and attention and expense which he has given, and wishes to be made more secure.

Desirous that right should be done to Mr. Nippes, who is an industrious, deserving man, I had intended to call upon you in person respecting it, but have been prevented from doing so yet. In the meantime please inform me what may be done. You will understand, I hope, that my object is merely to act in compliance with Nippes's request, and to do nothing but what may be strictly just and right. *A conditional contract*, containing all that your letter to me contained, would satisfy Mr. Nippes, and at present I cannot see any impropriety in doing so. I feel myself, however, entirely willing to abide your opinion in the matter.

With great respect, yours,

J. FORNANCE.

Col. G. TALCOTT,
Ordnance Department.

Colonel of Ordnance to Hon. J. Fornance.

ORDNANCE OFFICE,
Washington, December 11, 1840.

SIR: Your letter of the 9th instant, in relation to the affairs of Mr. Nippes, has been received. There is no hazard or difficulty in the case. Mr. Nippes may safely rely on the letters from this office, and if he complies with what pertains to his share of the business, he may depend on having a contract.

It is not usual to make conditional agreements in any other way than that which has been followed in his case, and you may assure him of its security in any event that can possibly occur.

Respectfully, your obedient servant,

G. TALCOTT,
Lieutenant Colonel of Ordnance.

Hon. J. FORNANCE,
House of Representatives.

B.

Contract with L. Pomeroy.

This agreement, made this 17th day of March, 1842, between Geo. Talcott, lieutenant colonel of ordnance, in the service of the United States, acting with the consent and under the direction of the Hon. John C. Spencer, Secretary of War, of the one part, and Lemuel Pomeroy, of Pittsfield, State of Massachusetts, of the other part, witnesseth: That whereas a contract was made on the 26th of February, 1840, between the said Pomeroy, of the one part, and the said Talcott, acting with the consent and under the direction of the Hon. J. R. Poinsett, Secretary of War, of the other part, whereby the said Pomeroy contracted to manufacture and deliver six thousand muskets for the service of the United States, as by reference thereto will more fully appear; and whereas the fourth article of the said contract stipulates that the United States shall pay to the said Pomeroy twelve dollars and a half for each of said muskets complete, and "that when the actual cost of manufacturing muskets at the public armories shall be satisfactorily ascertained, that then the said Pomeroy shall be entitled to receive from the United States, for each of the said six thousand muskets, the same sum which the actual cost of manufacturing a musket in the Springfield armory shall amount to, in lieu of the twelve dollars and a half aforesaid, the said average cost to be ascertained within two years from the date hereof, it being fully understood by the respective parties to this agreement that the interest in the entire capital employed at the Springfield armory, insurance against all risk, with the addition of such further per centage for wear and decay as shall be sufficient to preserve said capital unimpaired, shall be charged as making a part of the cost of manufacturing arms at the United States armories:"

And whereas the time specified in the said contract, to wit, "two years," has already elapsed, so that it has become necessary to ascertain the price that the United states shall pay to the said Pomeroy for the said muskets; and whereas serious difficulties exist and hinder the ascertaining the precise actual average cost of the muskets manufactured within the last two years at the Springfield manufactory, but an approximation thereto has been arrived at, mutually satisfactory:

Now, therefore, be it known, that the said parties to this agreement have agreed, fixed, and settled, and do hereby settle and fix the price to be paid by the United States to the said Pomeroy, for the said six thousand muskets, as follows, viz: for the first two thousand one hundred, which have already been delivered by him, and inspected and received by the United States, the said Pomeroy shall be paid at the rate of sixteen dollars for each musket, and for the thirty-nine hundred remaining to be delivered, he shall be paid at the rate of fourteen dollars and fifty cents for each musket; and the implements, packing-boxes, and transportation of the whole number, shall be paid for as specified in the original contract.

If is also further agreed that, in consideration of the great expense incurred by the said Pomeroy, in preparing tools and machinery suited to the manufacture of the new model muskets, and the limited number

embraced in his said contract, the said parties of the first part do hereby extend the said number to seven thousand muskets and implements for the same; and the number of one thousand, now added to the said original contract, shall be delivered and received, subject to all the rules of inspection, and other conditions pertaining to the original number of six thousand, but may be delivered by the said Pomeroy, and spread, at his own option, throughout the time, viz: three years, that his contract now has to run; and it is further agreed, that the United States shall pay the said Pomeroy fourteen dollars and fifty cents for each of the said one thousand muskets, when inspected and received; and the same price for the implements, boxes, and transportation, as provided in the original contract to which this agreement is a supplement.

In witness whereof, the said parties aforesaid have hereunto set their hands and affixed their seals, the day and year first above written.

G. TALCOTT, [SEAL.]
Lieut. Colonel Ordnance.

L. POMEROY. [SEAL.]

Witness:
W. C. REDDALL,
M. ADLER.

Approved, March 18, 1822.

J. C. SPENCER.

ORDNANCE OFFICE,
Washington, May 29, 1852.

I certify that the within contract is a true copy of the record in this office, the original being on file in the Treasury Department.

H. K. CRAIG,
Colonel Ordnance.

D. Nippes to Secretary of War.

JULY 14, 1842.

DEAR SIR: Agreeably to several letters from the Ordnance Bureau, I was instructed and directed to manufacture muskets of the new model, with the understanding to have a sufficient quantity to pay for the trouble of making machinery for the manufacture of said muskets.

This order was given some two years ago; and as yet I have delivered but five hundred muskets, in consequence of having so much machinery to make.

As it is important to me that I should have a certain contract, both as to number of muskets as well as price, I now respectfully ask a specific order to make eighteen hundred per year, for three years, to commence from the 1st January next, at the price of fourteen dollars and fifty cents per musket; said musket to be made agreeably to the model furnished, and to pass the inspection of the proper officers.

With respect, I am, your most obedient servant,

DANIEL NIPPES.

Hon. J. C. SPENCER, *Secretary of War.*

Secretary of War to D. Nippes.

WAR DEPARTMENT, *July* 15, 1842.

SIR: In answer to your letter of the 14th instant, I transmit herewith the report of the officer in charge of the Ordnance Bureau, by which you will see that the only objection to increasing the number of muskets under your contract, is the want of funds to pay for more than are covered by our existing contracts.

Very respectfully, &c.,

JOHN C. SPENCER.

Mr. DANIEL NIPPES.

Colonel of Ordnance to Secretary of War.

ORDNANCE OFFICE,
Washington, Jnly 15, 1842.

SIR: In reply to the letter of Mr. Daniel Nippes, concerning a contract for muskets, referred to this office for report, I have the honor to state that Mr. Nippes was formerly engaged in manufacturing muskets of the old model for the United States, and on the 9th or March, 1839, a letter was addressed to him from this office, a copy of which is enclosed. As Mr. Nippes performed most of his work without the aid of machinery, it was supposed that he could not undertake to make arms of the new model with any prospect of success; but, at his earnest request, he was authorized to make two hundred, and informed that this number would afford evidence of his ability to continue the work, and, in the event of their being received by the inspectors, he should be allowed to furnish not less than eight hundred per year for five years. This was in the summer of 1840. In January last he delivered the two hundred muskets, and the inspectors pronounced them equal in all respects to those made at any other place. In June last he delivered three hundred more. In order to make the workmanship sufficiently perfect to pass inspection, he now states that he has expended a large sum of money in providing the necessary machinery, and desires authority to furnish eighteen hundred muskets a year for three years, to commence on the 1st January, 1843, at $14 50 each. He states verbally that he can deliver six hundred additional before that time.

The whole number that was first allotted to him for five years, in case of his succeeding in the business, was four thousand—say from January 1, 1841, to December 31, 1845—and the number was thus restricted on account of the demands upon the fund for arming the militia. If he delivers eleven hundred in 1842, and eighteen hundred per year for the next three years, he will exceed the quantity assigned to him twenty-five hundred.

Mr. Nippes was formerly authorized to deliver one thousand muskets per year. In the letter from this office of March 9, 1839, he was informed that the orders for muskets would "necessarily be diminished

in the future," and, having this letter in view, but eight hundred per year were allotted to him.

Under all the circumstances of the case, and without recognizing any right on the part of Mr. Nippes to ask for an increase in the number of arms to be furnished by him, I am compelled to state that the fund for arming the militia has already been pledged by contracts to nearly its full amount, so that no extension can be given to the number of arms to be furnished by any contractor.

The letter of Mr. Nippes is returned herewith.

I am, sir, very respectfully, your obedient servant,

G. TALCOTT,
Lieutenant Colonel Ordnance.

Hon. J. C. SPENCER,
Secretary of War.

Statement of account with D. Nippes.

The United States

To D. NIPPES, DR.

July 16, 1842.	For allowance on 500 muskets, delivered under his assignment of October 8, 1850, at $2 each.....	$1,000

Explanations in reference to this account.

On the 9th of March, 1839, an assignment was made to Mr. D. Nippes of 1,000 muskets, at $12 25 per musket, which he has delivered. In the same letter inducements were held out to him for the manufacture of the new pattern musket, of which an assignment was made to him, on the 8th October, 1840, for the manufacture of 800 muskets per annum, for five years, at the conditional price of $12 75 each. In the process of their manufacture, it was found that $12 75 was not an adequate compensation, and it has now been established at $14 75—viz., $14 50 for the musket and 25 cents for the appendages—at which price the 500 already delivered, and those hereafter to be delivered, are to be paid for; and it is accordingly requested that the sum of $1,000 being the amount of the annexed account, may be paid to Mr. D. Nippes, out of the appropriation for "arming and equipping the militia."

To W. B. LEWIS, Esq., *Second Auditor.*

ORDNANCE OFFICE, *July* 16, 1842.

Respectfully submitted to the Secretary of War for his approval.

G. TALCOTT,
Lieutenant Colonel Ordnance.

Approved:

J. C. SPENCER,
Secretary of War.

D. Nippes to Lieutenant Colonel Ordnance.

MILL CREEK, LOWER MERION, PA.,
October 14, 1842.

SIR: On receiving a letter from Captain Thornton concerning inspector to inspect muskets, he mentions that he is not authorized to receive more than eight hundred muskets this year, and that number yearly. The colonel will find in the letter dated July 15, 1842, where it mentions the number of muskets allotted to me is four thousand, say from January 1, 1841, to December 31, 1845.

To turn that number within the time above mentioned would make three thousand five hundred that is yet to be delivered; and eight hundred per year would not amount to the small number of four thousand in the five years.

As it has taken better than one year of the five to make the necessary tools and machinery, at a great expense, to make the muskets as any other made, I understood the colonel to say, verbally, that the department would receive six hundred muskets in addition to the five hundred already delivered in this year, (and should have been done, provided I had not been detained by not having an inspector in proper season.) I have been awaiting now four weeks for an inspector, and have not got one as yet. Captain Thornton informed me yesterday that he would send me one.

Respectfully, I am, sir, your most obedient servant,

DANIEL NIPPES.

Col. G. TALCOTT,
United States Corps of Ordnance.

Colonel of Ordnance to D. Nippes.

ORDNANCE OFFICE,
Washington, October 20, 1842.

SIR: Your letter of the 14th instant has been received. Taking into view all the circumstances connected with your *agreement* for furnishing this department with four thousand muskets from the 1st of January, 1841, to the 31st December, 1845, at eight hundred muskets per annum, it has been thought proper to waive the question of your failure in delivering the stipulated number of eight hundred per annum, commencing from the 1st of January, 1841; and in order, therefore, to still afford you the full benefit of *the agreement*, you are hereby authorized to deliver the remaining thirty-five hundred muskets within the years 1842, 1843, 1844, and 1845—the deliveries in any one of those years not to exceed one thousand muskets. Captain Thornton has been advised of this arrangement.

Respectfully, &c., &c.,

G. TALCOTT,
Lieutenant Colonel Ordnance.

Mr. D. NIPPES,
Mill Creek, Lower Merion, Pa.

P. S. As you have already delivered five hundred muskets this year, of course only five hundred more can be received during the remainder of it. G. T.

D. Nippes to the Colonel of Ordnance.

LOWER MERION, MONTGOMERY COUNTY, PA.
December 19, 1844.

DEAR SIR: I learn from Mr. Butterfield, of Philadelphia, that it is your opinion that the government will not have any more muskets made by private contract. The four thousand which they gave me to make will soon be completed, as I have a large portion of them now on hand in various stages of manufacture, and will have them all done in a year from this time. I have incurred a heavy expense in making machinery for the manufacture of muskets, and have necessarily involved my property to pay for the same in the expectation that the work would be continued after the completion of the present contract, and if no more work is given me it will be my ruin.

I therefore earnestly solicit, and hope to receive, a continuance of the work, or, if the department cannot give me muskets, I would respectfully ask a share of the pistols, as I can alter my machinery to make them at a small expense, and will undertake to make them (say three thousand a year for five years) as cheap as any armory in the country, subject to the same inspection.

If you will have the goodness to make my case known to the Secretary of War, I cannot but think that his sense of justice will induce him to give me a portion of the work; by so doing you will greatly oblige

Your obedient servant,
DANIEL NIPPES.

Colonel GEO. TALCOTT.

Colonel of Ordnance to D. Nippes.

ORDNANCE OFFICE,
Washington, December 20, 1844.

SIR: Your letter in relation to further contracts for muskets has been received, and in reply I have to state that nothing has been determined on, except that the stock of muskets belonging to the United States is so large (over five hundred thousand) it is not deemed necessary to increase the number at present.

I am, sir, respectfully, &c.,
G. TALCOTT,
Lieutenant Colonel Ordnance.

DANIEL NIPPES, Esq.,
Lower Merion, Montgomery County, Pa.

Colonel of Ordnance to Hon. J. S. Yost.

ORDNANCE OFFICE,
Washington, February 17, 1845.

SIR: I have to acknowledge the receipt of a letter from Mr. Nippes, which you have referred to me for reply, and in answer have to state, that no such decision has been made as regards future contracts for muskets, the subject being postponed at present; but before the existing contracts shall have been fulfilled I have no doubt it will be taken up by the War Department.

As regards the ability of Mr. Nippes, and the quality of his work, I have no hesitation in saying that the arms furnished by him are stated to be superior to most other contract arms, and, therefore, he stands on as good grounds as any other of the old contractors.

Mr. Nippes's letter is returned herewith.

I am, sir, very respectfully, your obedient servant,

G. TALCOTT,
Lieutenant Colonel Ordnance.

Hon. JACOB S. YOST,
House of Representatives.

Hon. J. S. Yost to D. Nippes.

WASHINGTON, *February* 18, 1845.

DEAR SIR: After calling repeatedly on the Secretary of War, and Ordnance office, and every time get satisfactory answers and assurances that if the present powers had the contract to renew, you certainly should have a new order to fill; that your muskets were equal, if not superior, to any that were made; indeed, I felt myself very much flattered to hear so much said in praise of the work of one of my constituents. I have no doubt I can get a new contract for you when the present is filled. I hope you will remind me of it when new contracts are given out.

To show you what Mr. Talcott said, I addressed him a note with your letter, the answer thereto you will find enclosed.

Very truly, your obedient servant,

J. S. YOST.

DANIEL NIPPES, Esq.

Hon J. S. Yost to the Secretary of War.

HOUSE OF REPRESENTATIVES, *December* 4, 1845.

SIR: Mr. Nippes, of Pennsylvania, wishes his contract for making muskets renewed or extended, allowing him to manufacture, as heretofore, from eight hundred to one thousand per annum for five years.

He informs me that at the time of taking the contract of eight hundred per annum he was assured that it was merely nominal, that no doubt he would be allowed an increased number. Relying on this assurance, he purchased machinery amounting to some thousands of dollars, and further states that the amount made by him will not pay him for the expenses he has been compelled to incur in order to make the workmanship sufficiently perfect to pass inspection. He therefore desires authority to furnish five thousand or six thousand more muskets.

I am, sir, very respectfully, your obedient servant,

J. S. YOST.

Hon. W. L. MARCY,
Secretary of War.

Colonel of Ordnance to the Secretary of War.

ORDNANCE OFFICE,
Washington, December 5, 1845.

SIR: In reference to the extension or renewal of the contract of Mr. Nippes, (being the subject of Hon. J. S. Yost's letter of the 4th inst., referred to this office,) I have the honor to report:

That Mr. Nippes has made for this department good flint-lock muskets, and that the number to be delivered under his contract will be completed this year. The stock on hand of this kind of muskets being considered sufficient, it is not thought advisable to procure more; but if it were, this department has not authority to extend or renew the contract without previously advertising for proposals, and taking the lowest bid.

Mr. Yost's letter is returned.

Respectfully, &c., &c.,

G. TALCOTT,
Lieut. Col. of Ordnance.

Hon. W. L. MARCY,
Secretary of War.

D. Nippes to the Secretary of War

WASHINGTON CITY, *February* 27, 1846.

SIR: When I took a contract for making muskets several years since, it was for the small number of 4,000, being 800 a year; the change in the model from which I had formerly worked subjected me to provide a quantity of expensive machinery, which has not only taken all my profits but a great deal more, so that I am much worse off now than when I began. I thought that the United States would always make muskets to arm the militia. I supposed that when my contract was fulfilled, I should get another, provided I made good arms and gave satisfaction, which I believe I have done.

I am met now by a refusal to renew my contract; and it seems to me a hard case that when I have done well, I should be left to bear all the expenses, without remedy; for then my expenses were gone into so that the work might be of the very best kind.

I have understood that Mr. Pomeroy had an allowance for his great expenses, by increasing the number of arms to be made by him over and above what his contract called for.

If this is so, I hope the same favor will be allowed to me, more especially as my contract was for so small a number, for it takes about as much machinery to make a few arms as a great many.

Trusting to your sense of justice in this matter,

I remain, respectfully, your obedient servant,

DANIEL NIPPES.

Hon. W. L. MARCY,
Secretary of War.

Colonel of Ordnance to D. Nippes.

ORDNANCE OFFICE,
Washington, March 3, 1846.

SIR: Referring to your letter to the Secretary of War of 27th ultimo, I have now to inform you, that the recommendation of this office to extend your order for muskets, to the extent of two years' delivery, has been approved.

You are therefore authorized to furnish sixteen hundred muskets, in addition to the four thousand ordered of you in October, 1840, and for which you will be paid at the rate of $14 50 each.

I am, sir, respectfully, your obedient servant,

G. TALCOTT,
Lieutenant Colonel Ordnance.

DANIEL NIPPES,
Mill Creek, Pennsylvania.

The Colonel of Ordnance to the Secretary of War.

ORDNANCE OFFICE,
Washington, March 3, 1846.

SIR: I have to acknowledge the receipt of Mr. D. Nippes's application to you to have his contract extended, as was done in the case of L. Pomeroy, and respectfully report as follows:

In 1840 a contract was made with Pomeroy for the manufacture of six thousand muskets at $12 50 each, this price to be contingent on the cost of making arms at Springfield armory, and this cost to be ascertained within a given time. Owing to the change of model, and the change of machinery consequent thereto, it was found impracticable to ascertain this cost within the given time, and to obviate difficulties, on the 17th of March, 1842, a supplementary contract was made with him, in which he was allowed to deliver one thousand muskets more,

making seven thousand in all; he was allowed $3 50 additional, on two thousand one hundred, which he had already delivered, and was to receive $14 50 for the three thousand nine hundred which he was still to furnish. This contract has been fulfilled.

In October, 1840, Mr. Nippes was given an *order* for eight hundred muskets a year for five years, at the like conditional price of $12 50 each. After he had delivered five hundred muskets under this order, he complained that he could not make them for the price, and upon a review of the case he was, on the 16th of July, 1842, allowed $2 each on the five hundred delivered, and $14 50 for those to be delivered; he has still three hundred to deliver to complete the order.

The muskets turned in by Mr. Nippes are stated by the inspector to be of superior quality, and taking into consideration all the circumstances of the case, it would perhaps be an act of justice to increase the order to the extent of two years' delivery, that is, sixteen hundred muskets, at the same price of $14 50 each, which is respectfully recommended. Mr. Nippes's letter is herewith returned.

I am, sir, respectfully, your obedient servant,

G. TALCOTT,
Lieutenant Colonel of Ordnance.

Hon. W. L. MARCY,
Secretary of War.

Hon. J. S. Yost to the Secretary of War.

HOUSE OF REPRESENTATIVES,
Washington, February 11, 1847.

SIR: You will confer a great favor by giving your earliest attention to the accompanying letters of my friend Mr. Nippes. Please send your answer under cover to me.

I am, very truly, your obedient servant,

J. S. YOST.

Hon. W. L. MARCY, *Secretary of War.*

D. Nippes to the Secretary of War.

WASHINGTON, *February* 11, 1847.

SIR: Permit me to call your attention to a claim which I have against the United States, arising from the manufacturing and delivering of muskets under an engagement based upon a letter of Colonel Bomford, dated March 9, 1839; from this letter I expected to be placed upon an equal footing with the other manufacturers of muskets, but from the published report of the War Department I have ascertained that Mr. Pomeroy received for two thousand one hundred muskets $16 each, whilst I received but $14 50, having agreed to the receipt of this price under the belief at the time, from representations then made, as I understood them, that $14 50 was the maximum price; and as it has

always been admitted that the muskets manufactured by me are equal to those manufactured by Mr. Pomeroy or at the armories, I consider my claim for the additional compensation upon two thousand one hundred muskets of $1 50 each, to be founded upon principles of justice and equity, and trust that it will be so considered by the department. I would further beg leave to call the attention of the department to the fact that Mr. Pomeroy had awarded to him the manufacture of seven thousand muskets, whilst to me there was awarded but four thousand, and the outlay for machinery being heavy, and as great upon the smaller number as the larger, Mr. Pomeroy thereby derived much greater advantages than I have. My expenditures for machinery have been far greater than the profits realized from the price received; and the machinery for any other purpose is but of trifling value, thereby making the loss to me heavy.

I have the honor to be, very respectfully, your obedient servant,
DANIEL NIPPES.

Hon. W. L. MARCY, *Secretary of War.*

The Colonel of Ordnance to the Secretary of War.

ORDNANCE OFFICE,
Washington, February 13, 1847.

SIR: On the subject of Mr. D. Nippes's claim, as presented in his letter, accompanying that of the Hon. J. S. Yost referred to this office, I have to report:

Mr. Nippes claims that he ought to receive $1 50 additional per musket, for two thousand one hundred of the muskets which have been manufactured and delivered by him agreeably to orders from this department. He places this claim on the ground that Mr. Pomeroy was paid at that rate for an equal number of muskets, and that he should in justice be put on the same footing, as he made the same kind of arms and equally good.

In Pomeroy's case there was an agreement in writing, dated February 20, 1840, that he should be paid at the rate of $12 50 per musket: "*Provided*, That when the actual cost of manufacturing muskets at the public armories shall be satisfactorily ascertained, then the said Lemuel Pomeroy shall be entitled to receive from the United States for each of said muskets the same sum which the actual cost of manufacrtuing a musket at the Springfield armory shall amount to, in lieu of $12 50, the said average cost to be ascertained within two years from the date hereof."

Owing to the adoption of a musket of a new model, and the consequent change of machinery, it was found impossible to ascertain their cost within the specified time, and to settle the question, a supplementary contract was made with Mr. Pomeroy, dated March 17, 1842, by which he was allowed at the rate of $16 per musket for the two thousand one hundred muskets delivered up to that time, and $14 50 per musket for those he was yet to furnish.

Mr. Nippes's deliveries were made under an order given him in Octo-

ber, 1840, for eight hundred muskets a year for five years, at the price of $12 50 per musket. When he had delivered the first five hundred muskets he complained that this price was too low. His case was then examined, and he was, in July, 1842, allowed at the rate of $14 50 per musket, (the same price paid Pomeroy by the supplementary contract,) both for the muskets then delivered and for those remaining due under his order. The whole amount of his deliveries prior to the date of Pomeroy's supplementary contract was two hundred muskets, and even if their cases are made to agree exactly, as he claims they should, it would give him only the additional $1 50 on these two hundred muskets. But it is proper to remark that Mr. Nippes has already, in consideration of this very point, been allowed an extension of his order to the amount of sixteen hundred muskets, and of two years time to deliver them in. I do not, therefore, think that Mr. Nippes has any claim for an additional price for any muskets he has delivered.

Mr. Yost's letter with its enclosure is returned herewith.

I am, sir, respectfully, your obedient servant,

G. TALCOTT,
Lieutenant Colonel of Ordnance.

Hon. W. L. MARCY, *Secretary of War.*

Statement of the deliveries of muskets made by Mr. D. Nippes, under the order referred to in Colonel Talcott's report of February 13, 1847, and of the payments made to him therefor.

Date of delivery.	Number of muskets delivered.	Date of payment.	Amount paid, including packing boxes and transportation.	Price per musket, including appendages, at 25 cents per set.
1842.		1842.		
January 24	200	January 26	$2,595 00	*$12 75
June 24	300	June 27	3,893 00	*12 75
December	300	December 19	4,492 50	14 75
1843.		1843.		
February 22	300	February 24	4,492 50	14 75
June 28	300	July 1	4,492 50	14 75
November 22	300	November 23	4,492 50	14 75
November 29	100	December 1	1,497 50	14 75
1844.		1844.		
February 27	300	March 4	4,492 50	14 75
June 12	300	June 13	4,492 50	14 75
1845.		1845.		
February 19	400	February 24	5,990 00	14 75
July 19	300	July 21	4,492 50	14 75
September 16	300	September 18	4,492 50	14 75
1846.		1846.		
January 31	300	February 4	4,492 50	14 75
July 10	300	July 13	4,492 50	14 75
1847.		1847.		
January 26	200	January 29	2,995 00	14 75
June 10	300	June 12	4,492 50	14 75
October 22	300	October 25	4,492 50	14 75
November 25	200	November 27	2,995 00	14 75
1848.		1848.		
May 19	300	May 24	4,492 50	14 75
November 4	300	November 8	4,494 00	14 75
	5,600		82,868 00	

*July 16, 1842, an allowance was made to Mr. Nippes of $2 per musket on the 500 delivered by him in January and June, 1842, amounting to one thousand dollars; making the price paid for those muskets $14 75 each.

ORDNANCE OFFICE,
Washington, June 16, 1852.

An account for the foregoing allowance of one thousand dollars was sent to the treasury, July 16, 1842, with the following explanations:

On the 9th of March, 1839, an assignment was made to Mr. D. Nippes of one thousand muskets at $12 25 per musket, which he has delivered. In the same letter inducements were held out to him for the manufacture of the new pattern musket, of which an assignment was made to him on the 8th of October, 1840, for the manufacture of

eight hundred muskets per annum, for five years, at the conditional price of $12 75 each. In the process of their manufacture it was found that $12 75 was not an adequate compensation, and it has now been established at $14 75, viz: $14 50 for the musket and twenty-five cents for the appendages, at which price the five hundred already delivered, and those hereafter to be delivered, are to be paid for; and it is accordingly requested that the sum of one thousand dollars, being the amount of the annexed account, may be paid to Mr. D. Nippes out of the appropriation for "arming and equpping the militia."

G. TALCOTT,
Lieutenant Colonel of Ordnance.

WM. B. LEWIS, Esq., *Second Auditor.*

ORDNANCE OFFICE, *July* 16, 1842.

Respectfully submitted to the Secretary of War, for his approval.

G. TALCOTT,
Lieutenant Colonel Ordnance Department.

Approved July 16, 1842.

J. C. SPENCER,
Secretary of War.

Secretary of War to Hon. J. S. Yost.

WAR DEPARTMENT,
February 18, 1847.

SIR: I have the honor to enclose herewith a report from the Ordnance Bureau of this department, upon the claim or Mr. D. Nippes, presented in his letter of the 11th instant, and transmitted in yours of the same date.

It appears from this report that the price of the muskets furnished by Mr. Nippes, was fixed by contract—not left conditional as in the agreement with Mr. Pomeroy, to which he refers as a precedent in his favor—and full payment has been made to him, according to the terms of that contract.

Very respectfully, your obedient servant,

W. L. MARCY,
Secretary of War.

Hon. J. S. YOST,
House of Representatives.

E. Bates to D. Nippes.

SPRINGFIELD, *September* 4, 1847.

DEAR SIR: Your letter of the 31st August was received on the 2d, to which I hasten a reply. I called on Mr. Smith yesterday, and find since the date of my last letter to you, he has, by the request of Major Ripley, recommenced boring barrels in the Springfield armory, and is now engaged there.

Mr. S. is an excellent workman, and would have suited you. I know of no others here that would.

With respect to the cost of the musket, I will state what I have learned in reference to it, taking five years from 1841, to the end of the fiscal year of 1845:

Muskets of the flint lock, manufactured.....	29,720
Muskets percussion lock, manufactured.....	15,065
Muskets for cadets, percussion lock, manufactured.....	534
Pistols for cadets, percussion lock, manufactured.....	2
Total.....	43,321

Total amount expended same years, $763,963 77.

This sum divided on the number of arms manufactured during this same time, gives the cost of each arm a fraction over $16 84* At Harper's Ferry during the same were manufactured 24,381.

Sum expended, $831,200 67. The superintendent's pay, he being an officer of the *army*, *and the interest in the capital invested*, is not included, which would enhance the cost still more. It should be remembered that all the elements comprising the cost of the gun should be reckoned in order to arrive at the true cost, viz: machinery, repairs, permanent improvements, material, tools, and labor, &c.

I am expecting to be re-employed again at inspecting and desire this statement may not be published from me, but from pulic documents, if at all—but it may be, I think, relied upon. What the exact cost of the percussion is, I know not, but presume but little different from the flint.

Mr. Weatherhead, the master armorer here, it is said has resigned, and Mr. Erskine Allen put in his place; several other changes of minor importance have been made. Hoping the above may be satisfactory, I remain, very respectfully, your obedient servant,

ELISUR BATES.

D. NIPPES, Esq.

P. S.—I am quite sorry that you could not avail yourself of the services of Mr. Smith.

E. B.

The Secretary of War passed east a day or two ago, and is expected here on Monday next.

W. C. Reddall to J. H. Eaton.

WASHINGTON, *February* 25, 1850.

SIR: During the time that I was a clerk in the Ordnance Department, several manufacturers of small arms entered into contracts for the manufacture of muskets of the new models. The price to be paid them was what the musket would cost at Springfield armory, after adding the cost of machinery, interest of investment, &c., &c. By

*Should be $16 85.6.

reference to the contract previously entered into with Mr. L. Pomeroy of Pittsfield, it will be seen how the price of the arm was to be estimated.

Mr. Nippes, near Philadelphia, was at that time manufacturing the old model musket, and wished to manufacture some of the new model, and I think a proposition was made him to manufacture 800 per annum for five years. As a change of machinery was necessary, and which would involve a heavy outlay of capital, he was to receive the same rate per arm as the other contractors.

I am not certain that he was to manufacture the arms (new model) under an assignment, as I labor under the strong conviction that a contract was drawn by myself and prepared for signature, but its execution was postponed, as some conversation was had by Mr. Nippes and the then chief of the Ordnance department upon the subject of an increased number to be manufactured by Mr. Nippes over the 800 per annum.

Of this, however, I am certain that Mr. Nippes was to receive the same rate per musket as was paid to Mr. Pomeroy, under contract entered into with the Ordnance department by him.

I am, sir, very respectfully, your obedient servant,

W. C. REDDALL,
Of the Home Bureau, Department of State.

Gen. J. H. EATON,
Washington, D. C.

D.

Statement of D. Nippes.

MAY, 1850.

SIR: The following is a conversation that took place between Col. Talcott and myself in 1840. The Secretary of War gave me my choice, to make muskets or rifles. The colonel said he could insure me more than five thousand rifles, but said, "the musket is a national arm of defence and will be continued many years." I told him my only objection to the musket was the small number; four thousand would not justify my incurring the expense. He replied: "Mr. Nippes, that number is only nominal; we will or can enlarge it." I then told him: "Colonel, if you will increase the number, I will keep to the musket, go home and commence work."

Mr. Reddall, the clerk, (I refer you to Mr. R.,) asked me if I was going to take the contract? I replied: "Not now; I expect the colonel to increase it." Had I took the contract at this time, it would have place me upon the same footing with Pomeroy.

You, sir, will perceive that the colonel takes advantage of this circumstance to deprive me of my just due. Mr. Pomeroy's first contract was six thousand. When they setttled and established the price they not only paid him sixteen dollars for the two thousand one hundred, but added to his number one thousand more, making seven thousand, which number he was allowed to deliver in five years. I was allowed

only four thousand for the five years. They subsequently gave me sixteen hundred more, to be delivered in two years—being five thousand six hundred for a period of seven years. To manufacture these arms, I incurred as heavy expense, in getting up of machinery, as Pomeroy did, and the smallness of the number subjected me to many disadvantages that Pomeroy was not exposed to. I could have manufactured double the quantity, with more ease, in the same time.

I am, sir, with respect, your humble friend,

DANIEL NIPPES.

D. Nippes's statement of claim.

JUNE 10, 1852.

In the autumn of 1841, I engaged to make eight hundred model muskets for the United Statas annually, for five years—being, in all, four thousand—which were made and received by the Ordnance Department, and declared to be of superior quality. The contract was drawn up at the Ordnance Department, but it was not taken away by me, for the reason that I had the expectation of getting an additional quantity to the four thousand already at that time contracted for.

Mr. Lemuel Pomeroy, in February, 1840, had engaged at the department, to make and deliver to the United States a number of these guns, (six thousand;) and, among other things agreed upon, it was stipulated that the price of the gun should be fixed at *what would be ascertained to be its cost* at the *Springfield armory*, and in which estimate was to be included the interest of the entire capital employed, the wear and tear, and the insurance—all of which the United States was to have ascertained. Subsequently, (in March, 1842,) a new contract was entered into with Mr. Pomeroy, when it was agreed that for the two thousand one hundred, which, at that date had been delivered he should be paid the price of sixteen dollars for each gun; but the residue, which was engaged for under his first contract, with the further addition of one thousand more muskets, he agreed that the price to be paid him should be fourteen dollars and fifty cents.

Before the making of this last coatract with Pomeroy, to wit, in October, 1841, the undersigned had contracted with the government, the contract drawn up, which engaged that he should be paid the same price which was stipulated to be paid to Pomeroy; and towards the execution of his said contract, had actually delivered over to the government, in January, 1842, two hundred guns; his delivery under his contract, being two months before the first contract entered into with Pomeroy was changed by the second one of the 24th of March, 1842.

The inducement on the part of Pomeroy, to a change of his contract rested on two consideration: First, his number of guns was increased one thousand, and secondly, he was to receive at once sixteen dollars for the two thousand one hundred which at that time had been delivered, thus compromising the price.

But for the second contract, Pomeroy, in virtue of his first, would

have been entitled to be paid the cost of the musket as ascertained at Springfield. The same engagement was made with this memorialist, who has never consented to any change or alteration in it, and Mr. Pomeroy's having done so can in nowise affect him.

Yet, because of this after contract made with Pomeroy, after his own had been entered into, the Ordnance department insisted on paying only fourteen dollars and fifty cents, whereas he is justly entitled to sixteen dollars and eighty-five cents and six mills, the estimated cost of the musket by the superintendent at Springfield; and to which should be added, as the contract engages, interest on the entire capital of the armory, wear and tear, and insurance, which will place the cost of the arm at seventeen dollars and a half. Deducting the fourteen dollars and a half already paid to him, there is a balance of three dollars on each gun yet due to him justly—twelve thousand dollars.

DANIEL NIPPES.

DISTRICT OF COLUMBIA, *Washington County:*

This day appeared before me, a justice of the peace for the county and district aforesaid, Daniel Nippes, who made oath that the facts within stated are true to the best of his recollection and belief.

Given under my hand and seal the 10th of June, 1852.

B. K. MORSELL. [L. S.]

Colonel of Ordnance to Secretary of War.

ORDNANCE OFFICE,
Washington, July 19, 1852.

SIR: I have the honor to enclose herewith the statement of muskets delivered, and the prices paid to Pomeroy, called for by the Hon. J. McNair, in his letter to you of the 16th instant, referred to this office, and which is herewith returned.

I am, sir, respectfully, your obedient servant,

H. K. CRAIG,
Colonel of Ordnance.

Hon. C. M. CONRAD,
Secretary of War.

Statement of deliveries of muskets by, and payments made to, Lemuel Pomeroy, under his contracts with the United States dated February 26, 1840, and March 17, 1842.

Date of delivery.	Number of muskets.	Date of payment.	Amount of muskets, including appendages, at 25 cts. per set.	Am't of packing boxes & transport'n.	Aggregate amount.
1840.		1840.			
September 24	300	September 30	$3,825 00	$82 50	$3,907 50
December 18	300	December 28	3,825 00	82 50	3,907 50
1841.		1841.			
April 20	300	April 23	3,825 00	82 50	3,907 50
June 22	300	June 29	3,825 00	82 50	3,907 50
September 6	300	September 10	3,825 00	82 50	3,907 50
November 26	300	November 29	3,825 00	82 50	3,907 50
1842.		1842.			
March 4	300	March 16	4,425 00	82 50	4,507 50
May 7	300	May 9	4,425 00	82 50	4,507 50
August 4	300	August 18	4,425 00	82 50	4,507 50
October 15	300	October 19	4,425 00	82 50	4,507 50
December 29	300				
1843.		1843.			
		January 3	4,425 00	82 50	4,507 50
April 14	300	April 18	4,425 00	82 50	4,507 50
July 17	300	July 20	4.425 00	82 50	4,507 50
September 20	300	September 23	4,425 00	82 50	4,507 50
1844.		1844.			
January 9	300	January 13	4,425 00	82 50	4,507 50
April 13	300	April 15	4,425 00	82 50	4,507 50
June 11	300	June 12	4,425 00	82 50	4,507 50
October 7	300	October 9	4,425 00	82 50	4,507 50
1845.		1845.			
January 24	300	January 28	4,425 00	82 50	4,507 50
February 26	300	March 3	4,425 00	82 50	4,507 50
June 19	300	June 23	4,424 00	82 50	4,507 50
August 2	300	August 8	4,425 00	82 50	4,507 50
1846.		1846.			
January 10	400	January 13	5,900 00	110 00	6,010 00
	7,000		99,050 00	1,925 00	100,975 00

Agreeably to the contract of February 26, 1840, Mr. Pomeroy was to receive $12 50 per musket; but as by the 4th clause of that contract it was stipulated that he would be allowed the actual cost of muskets manufactured at the Springfield armory, and, in consequence of the difficulty of ascertaining the said actual cost, it was agreed (as expressed in the contract of March 17, 1842,) to allow him for the first 2,100 muskets $16 each, and for the remaining muskets $14 50 each.

In accordance with this agreement, Mr. Pomeroy was paid $7,350 in addition to the amount above stated, ($99,050,) being 106,400 in all for the 7,000 muskets.

H. K. CRAIG,
Colonel of Ordnance.

ORDNANCE OFFICE,
Washington, July 19, 1852.

Secretary of War to Hon. J. McNair.

WAR DEPARTMENT,
Washington, July 20, 1852.

SIR: In compliance with the request contained in your letter of the 16th instant, I have the honor to transmit herewith a statement by the Ordnance bureau of delivery of muskets and payments made to Lemuel Pomeroy under his contract with the United States.

Very respectfully, your obedient servant,

C. M. CONRAD,
Secretary of War.

Hon. J. MCNAIR,
House of Representatives.

A. S. Nippes to Hon. J. McNair.

MILL CREEK, *July* 27, 1852.

DEAR SIR: Yours of the 23d was duly received, but I am sorry to say that it did not contain *all* what I wrote for; so I have not been able to draw up the comments on the papers that you sent me as well as I should if I had all of the necessary information that was desirable; but such as it is I send it herewith, including all of the papers that you sent me both times. Those that I sent you, you did not return, so consequently you have them on hand. All the use that you can make of my comments, and even the papers that you got from the Ordnance office, will be to inform yourself of the merits of my father's claim, so that you can explain the merits of it to the committee. I hope that you will use all of your influence to get the committee to report in favor of the claim, and have it referred, by a resolution of Congress, to be settled by the Comptroller. My father sends his respects to yourself.

Truly, yours,

ALBERT S. NIPPES.

N. B.—Please push this matter before the committee as fast as possible, as Congress is near its close, and oblige your constituents, A. S. N. and D. N.

Hon. J. MCNAIR.

Extracts from public documents.

Extracts from executive documents to be filed in the case of Daniel Nippes *vs.* United States:

1. 26th Cong., 1st sess., 1839–'40, vol. 1, Doc. No. 2, p. 87, November 29, 1839; from the report of the Ordnance department: "The manufacture of muskets of the new model will be commenced at the national armories early next year, a large proportion of the necessary tools and machinery having been provided."

2. From vol. 3, Ex. Docs., same Cong. and sess., extract from the table of expenses for the fiscal year, being for nine months, ending September 30, 1839, the following:

"Springfield armory.—For lands, buildings, and other permanent improvements, $3,776 80. Muskets complete, 10,000."

3. 26th Cong., 2d sess., Ex. Docs., vol. 1, Doc. No. 2, page 55; report of the Secretary of War of November 30, 1840; extract as follows: "The manufacture of muskets according to the new model has been successfully established at both the public armories, and at some of the private armories."

4. This year, ending September 30, 1840, George Bomford, colonel of ordnance, reports no new model muskets manufactured at Springfield armory, and only three at Harper's Ferry; and 5,967 old model muskets at Springfield.

5. From Ex. Docs., vol. 2, Doc. 72, p. 15, 2d sess. 26th Cong., as follows: extract from the "statement of contracts made in the Ordnance department during the year 1840:" "L. Pomeroy, contractor for 6,000 muskets and appendages, at $12 75 each. To be made or delivered at Pittsfield, Massachusetts. 1,200 muskets per annnm to be delivered. Contract made on the 26th February, 1840, with Lieutenant Colonel G. Talcott."

6. Admission: "It is admitted that no further report of the Ordnance department of their proceedings and expenses was rendered at the 1st session of the 27th Congress, nor until the 2d session of said Congress."

7. From Ex. Docs., 27th Cong., sess. 1841–'42, vol. 3, Doc. 157, for fiscal year ending September 30, 1841; report of Col. Talcott, colonel of ordnance; extract the tabular statement as follows:

"For buildings, dams, canals, machinery, and other permanent improvements.....	$10,592 39
"Cost of arms made, (being entirely muskets,) including materials, workmanship, superintendence, and all other expenses.....	170,419 47
"Whole number of arms manufactured, muskets complete.....	10,700 "

Also the following extract: "The product of the armories has been this year much less than usual, in consequence chiefly of the introduction of a new and improved model of the musket, which has rendered necessary an alteration of the machinery for making arms. Since the date of the last report an important change in the admin-

istration of the national armories has taken place, by dispensing with the superintendents heretofore employed at them, and placing the armories under the immediate direction of ordnance officers. It is hoped that the services of other superintendents may be permanently discontinued."

8. 1841–'42, 2d session 27th Congress, (continued,) Ex. Doc. 207, vol. 4. The report of the board convened at Springfield, Massachusetts, August 30, 1841, to examine into the condition and management of the Springfield armory. Date of report, September 25, 1841.

9. It is agreed that the whole or any part of the above document 207 may be read in evidence without printing, on account of its great length.

10. Also "the letter of the Secretary of War, (Ex. Doc., 27th Cong., 2d sess., 1841–'42, vol. 5. Doc. 289,") respecting the disbanding the hands and closing the shops of Springfield and Harper's Ferry armories.

11. 1842–'43, 3d sess. 27th Cong., Ex. Docs., vol. 1, Doc. 2, p. 207; from the tabular report of Talcott, colonel of ordnance, for the fiscal year ending the 30th September, 1842:

"Expenditures in the Springfield and Harper's Ferry armories in the manufacture of muskets, and number of arms—

For Springfield	$140,769 56
For Harper's Ferry	131,836 90
For repairs and improvements—	
At Springfield	15,170 51
At Harper's Ferry	20,699 64

The muskets made are not apportionted to the respective armories in the report. The aggregate for both given is 16,295 muskets complete."

Further extract: "Some progress has been made in providing models, and in fabricating parts of percussion arms. The expenses of these, together with the cost of arms partly furnished and materials for the fabrication of arms, are embraced in the above statement of expenditures for the manufacture of arms. Much good is apprehended from the change dispensing with the superintendents."

12. From Ex. Docs., vol. 1, Doc. No. 3, 27th Cong., sess. 1842–'43, extract from Colonel Talcott's report and table respecting the private armories and cost thereof, as follows:

"Three private armories at Philadelphia, at which the price of the musket was $12 25 until 1840.

"Four in Connecticut, at which the price was the same until 1840.

"In 1840, 1841, 1842, the price for the old pattern is quoted at $12 25;" and during the same time—

"For the new pattern, $16 at the Pittsfield armory;" and

"$14 75 at the Philadelphia armories."

IN THE HOUSE OF REPRESENTATIVES, *February* 16, 1843.

Letter from the Secretary of War transmitting a report from the Ordnance office, in relation to the national armories, arms manufactured, &c.

WAR DEPARTMENT, *February* 16, 1843.

SIR: In answer to the resolution of the House of Representatives of the 3d ultimo, requiring the Secretary of War to report to the House, "as soon as practicable, 1st, the cost of the materials for the fabrication of fire-arms at the United States armories; 2d, the prices paid for labor on the musket; 3d, the expense per musket for all other labor, comprising the making and repairing of tools, pay of officers, &c., presenting a distinct statement for each of the last three years; and that he further report the amount expended at each of the armories during the same three years, separately, for all purposes not directly connected with the construction of the musket," I respectfully transmit, herewith, a report of the officer in charge of the Ordnance bureau, which, it is believed, contains all the information required by the resolution, as accurately as it can now be calculated.

The delay in this report has been occasioned by the difficulty of obtaining full returns, in exact conformity to the resolution, from the armories.

Very respectfully, your obedient servant,

J. C. SPENCER.

Hon. JOHN WHITE,
Speaker of the House of Representatives.

ORDNANCE OFFICE,
Washington, February 13, 1843.

SIR: I have the honor to submit herewith a tabular statement, embracing the information called for, in relation to the national armories, by the resolution of the House of Representatives of January 3, 1843. The resolution is herewith returned.

I am, sir, with great respect, your obedient servant,

G. TALCOTT,
Lieutenant Colonel of Ordnance.

Hon. J. C. SPENCER,
Secretary of War.

Statement of the cost of materials, labor, and all other expenses at the national armories during the years 1840, 1841, *and* 1842, *prepared in obedience to a resolution of the House of Representatives of January* 3, 1843.

1st. *Cost of the materials for the fabrication of fire-arms.*

Years.	Springfield armory.	Harper's Ferry armory.	
		Muskets.	Rifles and carbines.
1840	$32,790 01	$28,107 37	$7,625 02
1841	50,613 94	27,737 09	4,727 50
1842	44,069 41	20,664 56	5,657 00

2d. *Price paid for labor on the musket.*

Years.	Springfield armory.		Harper's Ferry armory.			
	Old model musket.	New model musket.	Old model musket.	New model musket.	Hall's rifles.	Hall's carbines.
1840	$6 50	$8 27	$6 99	----------	$6 00 56-100	$7 44 36-100
1841	----------	8 27	6 99	----------	6 44	----------
1842	6 50	8 27	6 97 1-10	----------	----------	5 36

3d. *The expense per musket for all other labor, comprising the making and repairing of tools, pay of officers, &c.*

Years.	Springfield armory.	Harper's Ferry armory.	
		Muskets.	Whole cost belonging to rifles and carbines.[c]
1840	$5 00½	$2 74 1-10	$8,992 94
1841	2 66⅛	2 52 2-10	9,478 06
1842	2 44 1-10	2 72 8-10	12,962 78

[c] The whole cost of rifles and carbines, under the third branch of the resolution, cannot be divided among the number completed without showing a false result, as but 1,213 rifles and 1,003 carbines were completed and turned into store during these years, while 1,000 rifles and 1,000 carbines remain in the shops, though nearly brought to completion.

STATEMENT—Continued.

4th. *Amount paid for all purposes not directly connected with the construction of the musket, including the repairs of buildings, new machinery, &c.*

Years.	Springfield armory.	Harper's Ferry armory.	
		Muskets.	Rifles and carbines.
1840	$15,652 00	$19,640 97	$8,650 00
1841	12,886 82	18,836 42	9,500 00
1842	18,466 01	19,886 28	9,000 00

G. TALCOTT, *Lieut. Col. Ordnance.*

ORDNANCE OFFICE, *Washington, February* 13, 1843.

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14. Then from Ex. Docs., vol. 3, 1st sess. 28th Cong., Doc. No. 23, extract from Colonel Talcott's tabular statement for nine months, ending June 30, 1843, when a new fiscal year was adopted, as follows:

"Paid for repairs, improvements, and new machinery for Springfield	$15,466 58
"Paid for materials and tools, for arms and appendages, workmanship on the same, salaries and incidental expenses incurred prior to the year	9,860 07
"Number of muskets	4,600
"Paid for the same within the said fiscal year	$53,469 48

No rifles, carbines, or other weapons besides new model muskets were manufactured during that year."

15. 2d sess., 28th Cong., 1844, 1845, Ex. Docs., vol. 2, Doc., No. 43. Copy from the report of Colonel Talcott, as follows:

"SPRINGFIELD ARMORY.—A careful and thorough inspection of this armory has been made, and its condition affords ground for bestowing high commendation upon the officer who has for some time past directed its operations. The judicious location of a steam engine at the workshops on the hill, distant from the water power, effects a great reduction in the cost of the work. It affords a blast of twenty-two fires in the forging shop, and motive power for a great number of machines used in finishing many component parts of arms, as well as lathes, &c., used in the machine shop; and much power still remains unapplied for future use," &c.

"The steam-engine is worth a visit to the armory." "The great economy resulting from such an auxiliary to hard labor, and saving the transportation back and forth from the hill to the water shops of

the arms in various states of preparation, besides avoiding delay, is of striking benefit, and is one cause of great reduction in the cost of arms. That cost is now less than twelve dollars per musket. And when barrel iron of still better quality than at present used shall be obtained, it will fall below eleven dollars."

16. From the tabular statement of expenses and number of arms for the fiscal year ending June 30, 1844, extract:

For Springfield.—For repairs, improvements, and new machinery.....	$38,098 97	
For materials, tools, and workmanship on arms and appendages, including salaries and all incidental expenses.....	$101,141 73	
Number of muskets complete—flint locks, 4,700; percussion do., 2,956; total.....		7,656

No other arms are reported as manufactured besides muskets, except "234 musketoons."

17. 1st session, 29th Congress, 1845, 1846, Ex. Doc., vol. 1st, Doc. No. 2, page 402. Extract from the tabular report of Colonel Talcott to June 30, 1845:

"For the manufacture of arms, including appendages, component parts, model arms, guages, tools, &c., and for the purchase of materials for the same.....	$144,706 04
For repairs, implements, and machinery.....	28,718 16
	173,047 24

Number of percussion muskets complete.....	12,107
Do. cadets do do	300

996 screw drivers, 3,480 wipers, 50 ball screws, 868 spring vices, 2,370 leather cone pads, besides appendages in different stages of fabrication, which had not been taken from the shops for assembling into complete arms." (See report of Springfield armory, idem page 421; also, Ex. Doc. vol. 4 same session, Doc. 96.

18. Second session, 29th Congress, 1846–'7, Ex. Doc. vol. 1st, Doc. No. 4, page 146; extract as follows from Colonel Talcott's report for the year ending June 30, 1846:

For Springfield armory: For the manufacture of arms, including appendages, component parts, guages, tools, and the purchase of materials for the same.....	$175,614 84
For repairs, improvements, and new machinery.....	41,722 56

Number of muskets complete at Springfield, percussion, 14,265; with 30,000 pieces of appendages. (See also the report of Major Ripley, same vol. &c., page 165)

19. To be read in evidence if necessary, tabular statement of expenses at the two national armories aforesaid, number and kind of arms, &c , for the fiscal year ending June 30, 1847; also, Major Ripley's report, same volume of Ex. Doc., &c., &c., page 693.

Further extracts.

20. Ex. Doc. 1840–'41, vol. 2d, page 14; statement of the contract with Pomeroy of February 26, 1840, viz:

"For 6,000 muskets at $12 50 each for 5 years, 1,200 muskets a year."

21. Also, from Ex. Doc., 1842–'43, vol. 3, Doc. 68, page 57: "Contract with Pomeroy, March 18, 1842, for 1,000 muskets, at $14 50 each, deliverable in 3 years."

21. Same document, page 58. Under the head "Principal articles obtained by open purchase and agreement at the Ordnance office during the year ending December 31, 1842, as follows:

"From Daniel Nippes 4,000 muskets, deliverable at the Frankford arsenal, price $14 75 each; date of order or agreement, March 9, 1839, and July 16, 1842. When to be delivered? 800 muskets per annum to January 1st, 1846."

Date of Colonel Talcot's above report, January 4, 1843.

Date of Secretary Spencer's above report, January 17, 1843.

JOHN S. TYSON,
Solicitor for Petitioner.

Depositions of M. Keely, W. Miles, and A. Nippes.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Depositions of witnesses taken before Samuel C. Perkins, commissioner of said court, at his office, No. 627 Walnut street, in the city of Philadelphia, State of Pennsylvania, on the 31st day of December, anno Domini one thousand eight hundred and fifty-seven, at 11 o'clock in the forenoon of said day, and by adjournment on the first day of January, anno Domini one thousand eight hundred and fifty-eight, at nine o'clock in the forenoon of said last mentioned day, to be used in the above case now pending in said Court of Claims.

SAMUEL C. PERKINS,
Commissioner of the United States Court of Claims.

Miles Keely, a witness, produced, sworn, and examined on the part of the claimant, deposeth as follows:

1. To the first interrogatory on the part of the claimant he answers as follows:

My name is Miles Keely, my age is thirty-eight; I shall be thirty-eight next September, (1858.) I have resided for the past year in Roxborough, twenty-first ward of the city of Philadelphia, State of Pennsylvania.

2. To the second interrogatory on the part of the claimant he answers as follows:

My occupation is that of millwright.

3. To the third interrogatory on the part of the claimant he answers as follows:

I have no interest, direct or indirect, in the claim which is here the subject of inquiry.

4. To the fourth interrogatory on the part of the claimant he answers as follows:

I am not related, in any degree, to the claimant in this case.

5. To the fifth interrogatory on the part of the claimant he answers as follows:

I worked under the employ of Joseph Randall, who was employed by Mr. Daniel Nippes, the claimant, to do the millwright work upon a manufactory for the making of muskets. I was not employed by the claimant to build for him a manufactory for the making of muskets. This manufactory was located on Mill creek, Montgomery county, Pennsylvania; I was employed in working there somewhere in 1840 or 1841. The time is so long ago I cannot recollect exactly. The building had formerly been a manufactory for guns, or muskets, and at the time I speak of as having been employed there it was being altered, and as I always understood the alterations were made for the purpose of constructing there "the new model musket," or a model musket of some kind.

6. To the sixth interrogatory on the part of the claimant he answers as follows:

As I have already stated, the building was already erected there and had been used for the manufacture of muskets. The original building was a one-story frame, with a loft over it. When the alterations were made as I have stated, the original structure was thoroughly repaired; it was also lengthened out, and a wing added at right angles to it on the front, and the whole building as altered was part two stories and part three stories high, another story having been added to the old part. As to the machinery and fixtures, there were two water-wheels, with forebays, each being connected with different parts of the machinery. One wheel was sixteen feet in diameter, and about seven feet wide; the other about fifteen feet in diameter and four and a half feet wide. They were pitch-back wheels. One of the wheels, the small one, drove the boring machine for boring the barrels, and various drilling machines; and the necessary gearing to drive these machines was connected with the wheel. I think this wheel also drove a fan and some other things. The large wheel did all the rest of the work. There were two or three boring machines; three or four drilling machines of different kinds, and a fan for blowing the fire. There was a milling machine; a machine for mounting ramrods, and several large grindstones; a stocking machine; two or three lathes; some punching machines, and sundry other fixtures and machinery, but not being familiar with gun machinery, and it being so long since, I cannot now specify more particularly. I do not mean to speak positively as to the diameters of the water-wheels, but they were about of the size I have stated. I remember there was also a circular saw.

7. To the seventh interrogatory on the part of the claimant he answers as follows:

The said buildings, machinery, and fixtures, were adopted specially for the manufacture of the new model muskets, or the model muskets, which I understood were to be constructed, I understood these muskets were to be made for the government.

8. To the eighth interrogatory on the part of the claimant he answers as follows:

I cannot speak of the cost of the said buildings or gun machinery. The millwright work I don't think could have been put there for less than thirty-three hundred or thirty-four hundred dollars. I include in this the water-wheels, forebays, and main gearing. The wheels were there at the time the alterations were made; they had been used in the old mill, but we thoroughly repaired them, and as it were made new wheels out of old ones. I suppose the expense of the repairs which were put on the millwright work was one-third, at least, of what the original cost would be. The buildings, machinery, and fixtures, were not fit for any other purpose. It was so constructed that they couldn't have altered it for any other purpose that I see. They could, of course, have used the wheels for something; but the way the building was located I don't see how they could have altered it so as to do anything with it. It was a different affair the way it was done for the gun-mill from what it would be for any other mill.

9. To the ninth interrogatory on the part of the claimant he answers as follows:

After the manufactory was completed and ready for work, I cannot say how long a time it was afterward before it commenced operation. They went to work at something as soon as the manufactory was completed, but whether upon the muskets, or not, I can't say.

10. To the tenth interrogatory on the part of the claimant he answers as follows:

I know nothing about the matter inquired of in this interrogatory.

11. To the eleventh interrogatory on the part of the claimant he answers as follows:

I only know in reference to the matters inquired of in this interrogatory that the manufactory was torn down, and a cotton-mill erected in its place. This was about four or five years ago.

12. To the twelfth interrogatory on the part of the claimant he answers as follows:

I am not able to make any estimate of the loss which the claimant sustained by being compelled to abandon the manufacture of the new model musket.

13. To the thirteenth interrogatory on the part of the claimant he answers as follows:

I do not know any other matter relative to the claim in question.

MILES KEELY.

STATE OF PENNSYLVANIA, *City of Philadelphia, ss:*

On this thirty-first day of December, A. D. one thousand eight hundred and fifty-seven, personally came Miles Keely, the witness above named, and having been first sworn to tell the truth, the whole truth, and nothing but the truth, the interrogatories hereunto annexed,

and specifically directed to be propounded to said witness, were severally proposed by the commissioner to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Miles Keely, taken at the request of Daniel Nippes, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of said Daniel Nippes. It appearing by the memorandum of the deputy solicitor of the United States appended to said interrogatories, hereunto annexed, that he consented to said deposition being taken without the formal notice required by the eleventh rule of said court.

SAMUEL C. PERKINS,
Commissioner.

Commissioner's fees, $3 50.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Deposition on the part of the claimant.

Interrogatory 1. What is your name, age, and what has been your place of residence during the past year?

Interrogatory 2. What is your occupation?

Interrogatory 3. Have you any interest, direct or indirect, in the claim which is here the subject of inquiry?

Interrogatory 4. Are you in any degree related to the claimant?

Interrogatory 5. Were you or were you not employed by the claimant to build for him a manufactory for the making of muskets? If yea, say when and where, and what sort of musket was to be there constructed?

Interrogatory 6. What was the character and description of the building constructed for this purpose? Describe also the machinery and fixtures connected with said manufactory?

Interrogatory 7. Were the said buildings, machinery, and fixtures adapted specially for the manufacture of the new model muskets for the government?

Interrogatory 8. What was the aggregate or separate cost of said buildings, machinery, and fixtures? Were they fit for any other purpose?

Interrogatory 9. When the said manufactory was completed and ready for work, how long a time was it afterwards before it commenced operation?

Interrogatory 10. If there was delay in such commencement, what was the cause of it?

Interrogatory 11. What disposition did the claimant make of said buildings, machinery, and fixtures, after he ceased making model muskets for the government?

Interrogatory 12. Are you able to make a reasonable estimate of

the loss which the claimant sustained by being compelled to abandon the manufacture of the new model musket?

Interrogatory 13. Do you know any other matter relative to the claim in question?

JOHN S. TYSON,
Counsellor for Claimant.

I have no questions to ask.

JOHN D. McPHERSON,
Deputy Solicitor.

WILLIAM MILES, a witness produced, sworn, and examined on the part of the claimant, deposeth as follows:

1. To the first interrogatory on the part of the claimant he answers as follows:

My name is William Miles; I am thirty-nine years old; my occupation is a carpenter; I have resided during the past year in Lower Merion township, Montgomery county, Pennsylvania.

2. To the second interrogatory on the part of the claimant he answers as follows:

I have no interest, direct or indirect, in the claim which is the subject of inquiry.

3. To the third interrogatory on the part of the claimant he answers as follows:

I am not, in any degree, related to the claimant in this case.

4. To the fourth interrogatory on the part of the claimant he answers as follows:

I have some knowledge of the kind of building formerly used by the claimant as a manufactory of the "new model musket" for the United States; it was what I would call a three story building, one story of stone and two stories of frame; some would call it two stories and a half, or two stories and an attic; the frame part was weather-boarded; it was about seventy-five feet long and thirty feet wide; the wing, which stood at right angles with the main building, was about twenty-two feet by twenty-four or twenty-six feet; there were three apartments in the basement or first story, two working rooms, and the centre room had the water wheels and grindstones; in the second story there were three rooms, two working rooms, and the third room had a grindstone in it; it was just over the wheels in the first story, and the stairway went up through it; the third story was all in one room; the wing was two stories high, but the lower story was open so that they could run the wagons in and load the arms from the trap in the floor above; the second story was all in one room, and was used as an inspection, and finishing, and packing room; the probable cost of the building was about twenty-three hundred dollars; I include in this simply the building, not the water-wheels, nor any part of the machinery or fixtures; there were connected with the establishment two or three other buildings, the cost of which is not included in this estimate; there was a blacksmith shop about twelve feet from the mill or manufactory, and a proof-house, also disconnected from the other buildings, and a magazine for storing powder stood about one hun

dred yards off; the probable cost of these other buildings was about three hundred dollars altogether.

5. To the fifth interrogatory on the part of the claimant he answers as follows:

In addition to the other buildings, the kind and probable cost of which I have stated in my answer to the fourth interrogatory, there were some six or eight tenant houses, erected for the use of the hands employed in the manufactory. These tenant houses were of the first class; six of them were of stone, two stories and a half high, and one single frame house two stories high. These tenant houses were all erected to accommodate the increased number of hands necessary and employed in manufacturing the new model musket. There were also upon the premises some three or four tenant houses which had been erected prior to the time when they commenced to manufacture the new model musket. I think the powder magazine was rebuilt at the same time they commenced to alter the building for the manufacture of the new model musket; and the blacksmiths' shop was, I think, also enlarged. The six new tenant houses I have mentioned, cost probably about twenty-six hundred dollars; all of that, at least. The new frame tenant house cost probably about four hundred dollars. My estimate for the six stone tenant houses is, now that I think of it, too low. I should have said twenty-eight hundred or three thousand dollars. The tenant houses that were already on the premises, prior to the time when they commenced the manufacture of the new model musket, cost about twelve hundred dollars probably.

6. To the sixth interrogatory on the part of the claimant he answers as follows:

The main building of the said manufactory was not capable of being used for any other purpose than that of manufacturing the new model musket. It stood idle for two or three years after they ceased manufacturing the said musket there, and was finally torn down and another mill for a different purpose erected in its place. The blacksmithshop and proof-house were both there for use in connexion with the manufactory of the muskets; and when this was torn down there was no further use for these other buildings and they were torn down also. The powder magazine stood back out of the way and was not torn down; but it was of no use afterwards. The tenant houses were used after the musket manufactory was torn down for the same purpose as before, rented out or occupied for dwellings.

7. To the seventh interrogatory on the part of the claimant he answers as follows:

I have already fully stated in my answer to the sixth interrogatory what became of the said buildings. No new disposition was made of them except as I have fully stated in said answer to the sixth interrogatory. The claimant did sustain loss by such new disposition. He lost the mill—that is, the buildings which were torn down were all a dead loss, except the stone, which was used in erecting the new mill, and a little of the old timber for lintels. He lost a good deal besides in the machinery, much of which was a dead loss to him. I cannot say to what amount he lost upon the machinery, for I have no knowledge. I should estimate his loss from his being compelled to tear

down his buildings at twenty-five hundred dollars. There was a loss also upon the tenant houses, caused by their standing empty and unoccupied during the time the buildings were standing idle and before the new mill was erected. This loss I am unable to estimate.

8. To the eighth interrogatory on the part of the claimant he answers as follows:

I do not know any other matter relative to the claim in question that I recollect of.

WILLIAM MILES.

STATE OF PENNSYLVANIA, } ss.
City of Philadelphia. }

On this thirty-first day of December, anno Domini one thousand eight hundred and fifty-seven, personally came William Miles, the witness within named, and having been first sworn to tell the truth, the whole truth, and nothing but the truth, the interrogatories hereunto annexed and specifically directed to be propounded to said witness were severally proposed by the commissioner to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of William Miles, taken at the request of Daniel Nippes, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of said Daniel Nippes, it appearing by the memorandum of the deputy solicitor of the United States, appended to said interrogatories hereunto annexed, that he consented to said deposition being taken without the formal notice required by the eleventh rule of said court.

SAMUEL C. PERKINS,
Commissioner.

Commissioner's fees $3.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Interrogatories to be propounded to William Miles:

Interrogatory 1st. What is your name, age, occupation, and residence during the past year?

Interrogatory 2d. Have you any interest, direct or indirect, in the claim which is the subject of inquiry?

Interrogatory 3d. Are you in any degree related to the claimant?

Interrogatory 4th. Have you any knowledge of the kind of building formerly used by the claimant as a manufactory of the new model musket for the United States? If yea, how was it constructed and of what materials? what were its dimensions, its apartments and probable cost?

Interrogatory 5th. Were there any shops, tenant's houses or other buildings erected and used in connexion with the said main building? If yea, what kind were they and what was their probable cost?

Interrogatory 6th. Was the aforesaid main building and the said additional ones capable of being used for any other purpose than that of manufacturing the new model musket?

Interrogatory 7th. After the claimant ceased to manufacture the said musket, what became of the said buildings? what new disposition was made of them, and did the claimant sustain loss by such new disposition? If yea, to what amount?

Interrogatory 8th. Do you know any other matter relative to the claim in question? If yea, state it?

JOHN S. TYSON,
Solicitor for claimant.

I have no questions to ask.

JNO. D. McPHERSON,
Deputy Solicitor.

Abraham Nippes, a witness produced, affirmed, (he having conscientious scruples against taking an oath,) and examined on the part of the claimant, deposeth as follows?

1. To the first interrogatory on the part of the claimant he answers as follows:

My name is Abraham Nippes, and I was fifty-seven years old on Saturday last, the twenty-sixth instant.

2. To the second interrogatory on the part of the claimant he answers as follows:

My residence for the past year has been at No. 522 Dillwyn street, twelfth ward, city of Philadelphia, and State of Pennsylvania.

3. To the third interrogatory he answers as follows:

I have no interest whatever, direct or indirect, in the claim which is the subject of inquiry.

4. To the fourth interrogatory on the part of the claimant he answers as follows:

I am related to the claimant. I am a nephew of his, a son of his brother.

5. To the fifth interrogatory on the part of the claimant he answers as follows:

I am not now engaged in any business, and have not been since the year 1850. My principal business prior to that time was gunmaking. I was engaged in that occupation from the year 1815 to the year 1850.

I had been employed the first two years under Daniel Hinkle, after that under M. T. Nickham, James Baker, George Schott, and Daniel Nippes. This was in one continued establishment, under diffcrent heads or employers.

6. To the sixth interrogatory on the part of the claimant he answers as follows:

I was employed by the claimant in the manufacture of muskets for the Unitcd States. This was from about 1838 down to the year 1849. From the time I was first employed by the claimant in the manufacture of muskets for the United States down to the early part of the year 1849, I was employed by him in the manufacture of the old model

musket; and from that time down I was employed by him in the manufacture of the new model muskets. Of the old model muskets I suppose he made about four thousand four hundred during the time mentioned; and of the new model muskets he made or manufactured two hundred exactly during my time with him. I am not positive as to the number of the old model muskets made by Daniel Nippes; and I think, on reflection, it was between three and four thousand. I was not employed continuously by Daniel Nippes from 1838 to 1849; but from 1838 to 1842 I worked for him in the manufacture of muskets for the United States. I then went to work for Mr. Edward K. Tryon, of this city, in making rifles. I continued with him till about 1848, when I returned to the employ of Daniel Nippes, and was employed by him in altering muskets for the United States from flint locks to percussion.

7. To the seventh interrogatory on the part of the claimant he answers as follows:

The claimant commenced making his preparations for the manufacture of the new model musket about the early part of the year 1840.

8. To the eighth interrogatory on the part of the claimant he answers as follows:

It was not less than two years at least between the time when the claimant commenced making his preparations for the manufacture of the new model musket and the time when he was completely ready to go on with said manufacture and turn out the said musket.

9. To the ninth interrogatory on the part of the claimant he answers as follows:

I can only answer this interrogatory by giving an explanation of the operations of the claimant in preparing for the manufacture of the musket. He commenced making his preparations as I have already stated in the early part of 1840. It was a new thing entirely, and required new machinery and new tools in many of its operations. The claimant was obliged to experiment on different machines and with different tools from time to time, for different portions of the work, until he ascertained by actual and repeated experiments that the machinery and tools were fitted for the purpose. Thus, during the years 1840, 1841, and 1842, he was engaged in the experiments upon different parts of the work, and from time to time, as the proper machinery and tools were discovered, he completed different parts of the musket, so that by about the end of the year 1842 there were completed and ready for delivery, and actually delivered, two hundred muskets. It was after this delivery that I left and went to work with Mr. Tryon. And it was not until shortly before this delivery that the claimant was completely ready to go on with said manufacture and turn out the said musket. These two hundred muskets were the new model muskets, and cost at least twenty-two or twenty-three dollars a piece, perhaps more, to manufacture. I was not employed by the claimant during the years 1843, 1844, 1845 and 1846, and therefore cannot speak from actual knowledge as to the cost of the manufacture of the new model musket during those years; but from my long and thorough acquaintance with the manufacture of fire-arms, and by my knowledge of the work required in the manufac-

ture of the new model musket, I can say that the average cost of each of the muskets manufactured by the claimant must have been during the years I have mentioned, that is from the commencement, not less than from eighteen to twenty dollars apiece. The claimant was very anxious that I should join him in the manufacture of these muskets; but I declined, because I did not think there was sufficient certainty in the price to be paid for the muskets by the government. Had the government agreed to give eighteen dollars a piece for the muskets, I should probably have accepted the claimant's proposition. I was unwilling to join him, however, without a certainty that the pay would be at least this much. I visited the various manufactories at the eastward where these guns were also manufactured; and from the tools and machinery employed, and the difficulties in the manufacture, I was fully convinced that money would be lost in trying to manufacture them at anything less than eighteen dollars; and I advised the claimant to have nothing to do with the manufacture; but he thought he could get along with it. I was fully convinced, I should have said, that money would be lost in trying to manufacture the muskets at fourteen dollars apiece; but at eighteen dollars apiece I would have been willing to run the risk of making something on the manufacture.

10. To the tenth interrogatory on the part of the claimant he answers as follows:

In my answer to the ninth interrogatory as to the cost of said muskets, I have included in the cost, as therein stated, all the items which would go to make up the actual cost of the musket; and I am unable to state the cost with any greater particularity than I have already done in said answer to the ninth interrogatory; and I cannot, therefore, state, in answer to this interrogatory, what would be the average cost for the whole of said period for insurance, pay of officers, and wear and decay of machinery. It would be impossible for me to form any estimate as to these matters. I can say this, however, that I do not think that fourteen dollars a piece would cover the mere cost of the musket alone, that is, the base material and labor, without any calculation as to the capital and machinery employed, or anything except the actual material and labor expended on each musket.

11. To the eleventh interrogatory on the part of the claimant he answers as follows:

I would not have been satisfied myself with less than four dollars profit on each new model musket, and I think from four to four and a half dollars would be a reasonable profit on each, considering the great difficulty there was in the manufacture, the perplexity, the rigid inspection, and all things together.

12. To the twelfth interrogatory on the part of the claimant he answers as follows:

The claimant did not make any profit on the manufacture of the new model musket, but on the contrary, he suffered a very heavy loss.

13. To the thirteenth interrogatory on the part of the claimant he answers as follows:

The establishment of the claimant was capable of manufacturing from one thousand to twelve hundred muskets per annum. With a

few additional tools and hands, but with the same machinery or perhaps a slight addition, the claimant could readily have manufactured in his establishment, from eighteen hundred to two thousand muskets per annum.

14. To the fourteenth interrogatory on the part of the claimant he answers as follows:

I think, on the old model musket, the claimant made a profit of from two and a half to three dollars, say three dollars apiece.

15. To the fifteenth interrogatory on the part of the claimant he answers as follows:

I do not know any other matter or thing in relation to the above claim, except that I would state that the profit of two dollars and a half on the old model musket was far preferable to what a profit of four dollars would be upon the new model musket, owing to the rigid inspection and the perplexity and difficulty in the manufacture of the latter. There would be more than a hundred per cent. difference in the two. I desire, also, to state here in explanation of the greater cost of the first two hundred muskets, that much of the work on them was done by hand before the proper machinery could be ascertained and perfected, I mean that parts of the musket which were afterwards turned out and manufactured by machinery, were then, that is when these first two hundred muskets were made, made or manufactured by hand labor.

ABR'M NIPPES.

STATE OF PENNSYLVANIA, }
City of Philadelphia. } *ss.*

On this first day of January, anno Domini; one thousand eight hundred and fifty-eight, personally came Abraham Nippes, the witness above named, and having been first solemnly affirmed, (he having conscientious scruples against taking an oath,) to tell the truth, the whole truth, and nothing but the truth, the interrogatories hereunto annexed and specifically directed to be propounded to said witness were severally proposed by the commissioner to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Abraham Nippes taken at the request of Daniel Nippes, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of the said Daniel Nippes. It appearing by the memorandum of the deputy solicitor of the United States, appended to said interrogatories hereunto annexed, that he consented to said deposition being taken without the formal notice required by the eleventh rule of said court.

SAM. C. PERKINS,
Commissioner.

Commissoiner's fees, $4.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Testimony of Abraham Nippes.

Interrogatory 1st. What is your name and age?

Interrogatory 2d. What has been your place of residence for the past year?

Interrogatory 3d. Have you any interest, direct or indirect, in the claim which is the subject of inquiry?

Interrogatory 4th. Are you related to the claimant; if yea, in what degree?

Interrogatory 5th. What is your occupation. How long have you been engaged in it. Under whom have you been employed?

Interrogatory 6th. Were you employed by the claimant in the manufacture of muskets for the United States; if yea, say when and what kind of muskets, and to what extent?

Interrogatory 7th. When did the claimant commence making his preparations for the manufacture of the new model muskets?

Interrogatory 8th. How long a time elapsed between such commencement and the time when he was completely ready to go on with said manufacture and turn out the said muskets?

Interrogatory 9th. What do you think was the cost of the new model musket during the first year of its manufacture, and what the cost during the subsequent years, say 1843, 1844, 1845, 1846?

Interrogatory 10th. What would be the additional average cost for the whole of said period for insurance, pay of officers, wear and decay of machinery?

Interrogatory 11th. What would be a reasonable profit on each new model musket?

Interrogatory 12th. Did the claimant make any profit on the manufacture of the said musket?

Interrogatory 13th. How many muskets per annum was the establishment of the claimant capable of manufacturing. Could he, with the same machinery, tools, hands, &c., which were employed in manufacturing 800 muskets per annum, have manufactured 1,800 per annum?

Interrogatory 14th. What profit did the claimant make on the old model musket?

Interrogatory 15th. Do you know any other matter or thing in relation to the above claim?

JOHN S. TYSON,
Sol. for claimant.

I have no questions to ask.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Deposition of Elizur Bates.

Interrogaries to be propounded to Elizur Bates, a witness on the part of the claimant.

Interrogatory 1st. What is your name, occupation, age, and place of residence for the past year?

Answer. Elizur Bates; by occupation I am a gunsmith; my age is sixty-six years, and my place of residence for the past year in Springfield, Hampden county, State of Massachusetts.

Interrogatory 2d. Have you any interest, direct or indirect, in the claim which is the subject of inquiry?

Answer. I have not any whatever.

Interrogatory 3d. Are you related in any degree to the claimant?

Answer. I am not.

Interrogatory 4th. Have you ever been engaged or employed as a manufacturer of arms (particularly the musket) as armorer, or inspector of arms; if yea, say when, where, and how long?

Answer. I entered the United States armory at Springfield in the year 1816 as a blacksmith, which had been my trade and business several years prior to this, and had carried on the blacksmith business on my own account three years, after having served a full apprenticeship to the business. I first worked at forging tools and the component parts of the musket, such as the bayonet, and worked on bands, plates, and various limbs of the lock, and at times, was employed at *finishing*, as it was called, in fitting and assembling the component parts of the musket together, preparatory to the final inspection, the component parts and limbs of the work having been previously and separately inspected during the process of the work from the first stages.

In the year 1834, I was appointed master armorer of the Springfield armory, and continued in the active duties of that office between three and four years, when I retired from the office and was thereupon appointed inspector of contract arms, so called, and performed that duty at several of the private armories in different States of the Union, where arms were manufactured for the United States, on contract, on private account.

In this service I continued till some time in the year 1842, when I was detailed by order of the Ordnance department to visit the various arsenals in the United States, and with another gentleman, Mr. Hoffman, immediately entered upon the duties of our appointment, of inspecting the arms that have for a long time been accumulating in said arsenals, and also of thoroughly overhauling, classifying, and stamping anew all the arms so deposited, after being properly assorted and examined. This last service was a thorough reinspection, and continued to October, 1846, when I relinquished the business entirely.

Interrogatory 5th. What sort or description of musket was manufactured at the Springfield, and other public armory, previous to 1840. By what name was it known?

Answer. It was called the *French musket*, and known as such when

I first entered the workshops of the Springfield armory. In 1822 it underwent some changes, and the arm was known and called as the *model* of 1822, and was so designated till 1840, when further changes and alterations were made in the musket, and it was then designated as the model of 1840.

Interrogatory 6th. Was the style and character of said arm afterwards changed? If yea, when, and how? What was the name of the new arm, and what was the specific difference between it and the old one?

Answer. The style and character of the work on the model of 1840 was an essential change. In familiar language, it was called the *French musket* and *new model musket*, but I do not mean to be understood that it was only known as the *French model*, and so recognized in the books, although it was called *French*, in distinction from the English style and characteristics, the latter being much more heavy or clumsy. When any great change was made in the style or character of the *arm*, the workmen found it convenient to designate it as the *new model*, and, in fact, we have had several that were properly called *new model muskets*. The change in the lock was great; the pan was dispensed with, and a *cone seat* substituted in its stead, that was attached to the barrel; and many other parts or limbs of the lock were altered, by substituting the percussion for the flint lock. By the introduction of the percussion, it was really a *new arm*, and was often called the *percussion model*, and in producing this many alterations were made in the component parts of the musket. From about 1839 to 1840–'41, the musket seemed to be constant in nothing but change, as regards the style and character of the work. The greatest change, however, was in discarding the *pan* and substituting the *cone seat*. Changes continued, and alterations were made till the time when the model of 1842 was produced, and we had another new model called the model of 1842, which has since been changed, radically, and almost entirely in all its features; and time would fail me to enumerate and point out all the improvements specifically, and the changes between the models of 1842 and 1855. The tools, machinery, and fixtures, were altered entirely, and it was necessary that very nearly all of them should be made anew, to produce the exactness and uniformity of style required to carry out a system of manufacture almost entirely new. This last great change, however, is not now a matter of inquiry, and perhaps should not have been here introduced.

Interrogatory 7th. Was any material change in the buildings, machinery, and tools, necessary for the manufacture of "the new model musket," and its accompaniments? If yea, state what change. State particularly all the modifications that you may recollect, and whether the expenses were considerable?

Answer. A material change was absolutely necessary in every old establishment, or armory, for the purpose of adaptation to new work, the new model musket. If the buildings and permanent fixtures were in good or tolerable condition for manufacturing arms generally, without regard or special reference to a new style, some of the arrangements or accompaniments might be saved, and found useful, but in the case supposed, almost everything, except the buildings, would re-

quire great alterations. The labor on new tools is one of the greatest items of expense, and this a very slow process, as I have found from my own experience, having been almost constantly, for a long period, employed on such work, directly and indirectly, during my early connection with the Springfield armory. In getting up a new manufacturing establishment of a new style of work, if of the same material, I know of none where more skill and practical knowledge and experience is required, than in fitting up and stocking with the proper tools and fixtures, with all its equipments, than a new gun shop.

I judge, from my own experience and observation, that the various changes and modifications in the *old model* and adopted in the *new* must have occasioned a very considerable increase of expense to the manufactured article—the *new model musket*—superinduced by such changes and modifications, inasmuch as a greater degree of perfection and uniformity was required and actually carried out, resulting from a long course of experiment and nice workmanship. The changes of model, style, &c., occurred in 1822, 1840, and 1842, and are so known and designated. That of 1855, the greatest of all, does not come within the scope of the present inquiry.

Interrogatory 8. By whom were the annual estimates of the cost of manufacturing arms at the Springfield armory made to the government?

Answer. By the principal officers of that institution—the superintendent and master armorer—assisted by the permanent inspectors of the work in the armory.

Interrogatory 9. In making those estimates, (by whomsoever made,) what elements constituting the cost of said manufacture were taken into consideration?

Answer. The stock and materials of all kinds and descriptions used and employed, and expenses paid for labor and service of all kinds, together with all salaries and pay, whether official, clerical, or otherwise.

Interrogatory 10. What, during the first year of the manufacture of "the new model musket" at the Springfield armory, was the cost of each musket, regarding in your estimate, as the elements of cost, only stock, materials, labor, and officers' salaries?

Answer. Not less than seventeen dollars and seventy-five cents, or not to exceed eighteen dollars and fifty cents.

Interrogatory 11. What officers were attached to said armory, and what were their respective salaries?

Answer. A superintendent, a master armorer, a paymaster, acting also as military storekeeper, four clerks, and eight permanent inspectors of the work, during my official connexion with said armory. Occasionally, and when necessary for a more rapid despatch of the work, temporary inspectors were employed, and their salaries were, respectively: Superintendent, $1,500, and quarters, fuel, forage; paymaster, $1,200, and quarters and fuel; master armorer, $800, quarters and fuel; inspectors, $800, quarters and fuel; clerks, $800, quarters and fuel.

Interrogatory 12. What (speaking, if not *accurately*, yet within the bounds of certainty) was the capital invested in said armory, the

rate of insurance against all risk, and the amount necessary to preserve the machinery unimpaired by wear and decay?

Answer. I should estimate insurance against all risk, and the expense of keeping and preserving the machinery in repair, from five to seven per cent., as nearly as I can form an estimate satisfactory to myself, and, as I believe, about right. I make this by comparison with other manufacturing establishments, which I think is about the usual and a reasonable per centage.

The real estate belonging to this armory is vastly more valuable now than in 1840. Since that time many acres of land, at a high rate and great cost, have been annexed to the armory domain, and building erected of vastly more value and cost than all the other and older buildings here belonging to the government. The additional and new machinery also are entirely beyond, as I apprehend, an accurate or satisfactory estimate by me, at that time or the present; and I can think of no safe and satisfactory way of making an estimate but by a full and patient examination of the books and armory accounts. My recollection will not help me to estimate for 1840 fully.

Interrogatory 13. Is there any material difference in value between the flint-lock musket and the percussion musket of the new-model kind?

Answer. The difference is not very great, if any. There was a difference in opinions in this matter, as well during the progress of the alterations and changes as after they had been perfected and adopted. They were both designated *new models*, or *new-model muskets*, in their turn. In the flint-lock I think the labor may be somewhat more, and the stock and materials a little less, than in the percussion. My opinion is, that there is not much difference.

Interrogatory 14. Have you any knowledge of the claimant as having been a manufacturer of firearms for the United States, particularly the musket? How long have you so known him?

Answer. I have known claimant several years—perhaps fifteen or twenty years—and, about the time I first had any knoweledge of him, he was a manufacturer of firearms for the United States, but believe he first made gun barrels, on contract, for the government.

Interrogatory 15. Have you any knowledge of his having been employed by the United States in the manufacture of the *new-model musket?* If yea, when was he first so employed, and how long?

Answer. I have, but cannot say how long he was so employed. He manufactured arms of the *new-model kind*, on a contract with the government, on the model of 1840, which was called the *new-model musket*, and do not recollect of any prior contract of his.

Interrogatory 16. Did the claimant visit the Springfield armory while you were there employed? If yea, say when, what was the object of his visit, and its results?

Answer. He often visited the Springfield armory while I was there employed, and I often heard conversations between him and the officers concerning the *new-model musket*, the tools, machinery, patterns, &c. He was here several days at a time, and appeared to take great interest in relation to his contract with the government; talked about

that and not much else. He was always, when here, quite busy in examining all patterns and tools; and, as I understood, his work was delayed for the want of patterns, models, tools, &c. I know that the officers in this armory readily gave him all the information in their power, and believe he was satisfied with the results of his visits from time to time. He said that he was going along with his preparations as rapidly as he could under the circumstances. He was furnished with patterns for exemplication, and implements for verifying the work.

Interrogatory 17. Were you present at the manufactory of the claimant at any time during the period in which he was engaged in the manufacture of the "new-model musket" for the government?

Answer. I was; and believe I inspected some 200 or 300 muskets in the early period of his contract. I had, however, previously inspected the limbs and component parts, as well before as after their being assembled together. This lot, according to my recollection, was of the model with flint-lock, and was "the new-model musket."

Interrogatory 18. Are you able to say, from what you saw while there, or from what you know of the peculiarities attending the manufacture of the "new-model musket" in a private manufactory, whether it was possible for the claimant to manufacture "the new-model-musket" at as little cost as attended its manufacture in the Springfield armory?

Answer. I believe the arm (new model of 1840) may be manufactured for about the same cost at a private manufactory of arms as at the Springfield armory; and have no doubt of it, provided the private contractor have the privilege of making the same number of arms, monthly or annually, that are manufactured at the Springfield armory in the same period. But to make one-twentieth, or even one-tenth the number, in a private manufactory, the cost would be considerably more in proportion to the private contractor.

Interrogatory 19. With the tools, machinery, hands, and other means possessed by the claimant, what number of "new model muskets" per annum *could* he have manufactured?

Answer. In my opinion I think he might have manufactured fifteen hundred of the new arm, or "new model musket" either on the model of 1840 or 1842, for the difference, if any, is small, and that in the labor.

Interrogatory 20. With tools, hands, machinery, and other means capable of manufacturing eight hundred or a thousand muskets per annum, how many more could be constructed? Suppose the owner of such a manufactory was desirous of constructing one thousand eight hundred "new muskets" per annum, could he do it with the aforesaid means? If not, what additional means would be required for the purpose?

Answer. With a little more capital and small amount of machinery and force, the claimant might manufacture from one thousand five hundred to one thousand eight hundred *new-model muskets* annually. I think the additional capital and force to perform the addititional work could not be great; for I consider his arrangements and facilities already about what would be required for considerable more work than he performed. I think there would be, comparatively, a loss, if

he should not have the privilege of manufacturing more than eight hundred of the same kind of arm annually; for he had abundant water power, tools, and machinery, and his whole establishment appears to have been fitted up in the best manner for his business, and, as a private one, second only to the national armories. This is my opinion, with the knowledge I then had of the claimant's new armory at Millcreek, about ten miles from Philadelphia, in 1841, and part of the year 1842, according to my best recollection.

Interrogatory 21. Was it possible for the claimant to construct a musket of the new model kind without first having in his possession one such musket for a pattern? And at the same time, when he commenced the manufacture of the said musket, could he possibly obtain such musket anywhere except at one of the United States armories?

Answer. It was not possible, in my opinion, for him to do so; nor could he obtain such pattern or model anywhere else except at one of the national armories.

Interrogatory 22. What would be the probable capital necessary for such an establishment as was that of Mr. Nippes, including only in your estimate the cost of converting it from the manufactory of the old-model musket to a manufactory of the new-model musket, the purchase of stock and materials, the salaries of officers, and wages of laborers, and amount necessary to preserve the machinery from wear and decay?

Answer. Mr. Nippes's establishment at Millcreek, when I examined his work, was about new, and was not converted from an old to a new armory. The building and workshops were new, and have not previously been used as a manufactory of arms, or any further than the forging and welding of barrels, and perhaps some parts of the musket, but to what extent I cannot say. The buildings were apparently new, as were also the permanent fixtures, machinery, and tools. I should be in doubt how to estimate the capital under this inquiry as embraced in this interrogatory. The amount necessary to preserve the machinery from wear and decay I should estimate at from five to seven per cent. I am not able to estimate the amount of capital invested, nor the value or cost of his establishment accurately, but it must exceed twenty thousand dollars.

Interrogatory 23. Have you at any time as public inspector of arms inspected the work of the claimant? If yea, say when and what was the character of said work?

Answer. I have; and the inspection was in the fall and winter of 1841–'42. According to my best recollection the inspection was commenced in October or November, 1841, and finished in January or February, 1842. I inspected every part and limb of the work separately, and proved and tried the work by verifying implements, and afterwards the entire musket when the parts were assembled. An officer of ordnance was with me a part of the time, and particularly when the inspection was concluded, and the work was satisfactory in every respect. The workmanship was of a high order, and the materials used in the manufacture were very good and should be classed with the best. I remember distinctly that the officer of ordnance ex-

pressed himself decidedly in favor of the work and materials; and before the inspection was commenced he and Mr. Nippes requested a very thorough inspection, and assigned this reason in particular that this was his first work, or *first job;* and I know that I made a close and thorough inspection.

Interrogatory 24. Supposing that the claimant, with every thing ready for the reception of such pattern musket, was obliged to wait three months for its reception, and then obliged to spend a whole additional year in the construction of the tools and machinery necessary for its manufacture, what (speaking if not accurately, yet within the bounds of certainty) would be to him the average cost per musket of each "new model musket" manufactured and delivered by him as follows: eight hundred in the first year, *thereafter* one thousand in the second year; six hundred in the third year, one thousand in the fourth year, and six hundred in the fifth year; including also in your estimate the charge for superintendence-and salaries of subordinate officers, interest on the capital employed, insurance against all risk, and a reasonable allowance for wear and decay of machinery?

Answer. Nineteen dollars and fifty cents, under all the circumstances enumerated in this interrogatory, and the disadvantages and inconveniences attending and obstructing his progress.

Interrogatory 25. What to a private manufacturer for the government would be a reasonable profit per musket upon each new-model musket manufactured by him?

Answer. From five dollars to six dollars per musket would be a reasonable profit.

Interrogatory 26. What price per musket of four thousand muskets, the manufacture and delivery of which is restricted to eight hundred muskets per annum; the first year, including the period when the said musket (the new model) was introduced into the United States, would you consider as equivalent to fourten dollars fifty cents per musket of five thousand four hundred muskets, to be manufactured and delivered in three years, the first year commenciug after the establishment was completely organized and in full operation?

Answer. Eighteen dollars.

Interrogatory 27. Do you know any other matter relative to the claim in question?

Answer. I do not.

ELIZUR BATES.

STATE OF MASSACHUSETTS, *County of Hampden, ss:*

On this 6th day of February, A. D. 1858, personally came Elizur Bates, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Elizur Bates, taken at the request of Daniel Nippes, to be used in the investigation of a claim against the United States,

now pending in the Court of Claims, in the name of Daniel Nippes. The adverse party was notified, did not attend, and did not object.

JAMES W. CROOKS,
Commissioner.

Fees of witness, $10; travel, 2 miles; attendance, 8 days; commissioner's fees, $20.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Interrogatories to be propounded to Elizur Bates, a witness on the part of the claimant:

Interrogatory 1. What is your name, occupation, age, and place of residence for the past year?

Interrogatory 2. Have you any interest, direct or indirect, in the claim which is the subject of inquiry?

Interrogatory 3. Are you related in any degree to the claimant?

Interrogatory 4. Have you ever been engaged or employed as a manufacturer of arms, (particularly the musket,) as armorer, or inspector of arms? If yea, say when, where, and how long?

Interrogatory 5. What sort or description of musket was manufactured at the Springfield and other public armory previous to 1840. By what name was it known?

Interrogatory 6. Was the style and character of said arm afterwards changed? If yea, say when and how? What was the name of the new arm, and what was the specific difference between it and the old one?

Interrogatory 7. Was any material change in the buildings, machinery, and tools necessary for the manufacure of "the new model musket," and its accompaniments? If yea, state what change? State particularly all the modifications that you may recollect, and whether the expense was very considerable?

Interrogatory 8. By whom were the annual estimates of the cost of manufacturing arms at the Springfield armory made to the government?

Interrogatory 9. In making those estimates (by whomsoever made) what elements, constituting the cost of manufacture, were taken into consideration?

Interrogatory 10. What, during the first year of the manufacture of "the new model musket" at the Springfield armory, was the cost of each musket, regarding in your estimate as the elements of cost only stock, materials, labor, and officers' salaries?

Interrogatory 11. What officers were attached to said armory, and what were their respective salaries?

Interrogatory 12. What (speaking, if not *accurately*, yet within the bounds of certainty,) was the capital invested in said armory, the rate of insurance against all risk, and the amount necessary to preserve the machinery unimpaired by wear and decay?

Interrogatory 13. Is there any material difference in value between the flint-lock musket and the purcussion musket of the new model kind?

Interrogatory 14. Have you any knowledge of the claimant as having been a manufacturer of firearms for the United States, particularly the musket? How long have you so known him?

Interrogatory 15. Have you any knowledge of his having been employed by the United States in the manufacture of "the new model musket?" If yea, when was he first so employed, and how long?

Interrogatory 16. Did the claimant visit the Springfield armory while you were there employed? If yea, say when, what was the object of his visit, and its results?

Interrogatory 17. Were you present at the manufactory of the claimant at any time during the period in which he was engaged in the manufacture of "the new model musket" for the government?

Interrogatary 18. Are you able to say from what you saw while there, or from what you know of the peculiarities attending the manufacture of "the new model musket" in a private manufactory, whether it was possible for the claimant to manufacture "the new model musket" at as little cost as attended its manufacture in the Springfield armory?

Interrogatory 19. With the tools, machinery, hands, and other means possessed by the claimant, what number of "new model muskets" per annum *could* he have manufactured?

Interrogatory 20. With tools, machinery, hands, and other means, capable of manufacturing eight hundred or a thousand muskets per annum, how many more could be constructed? Suppose the owner of such a manufactory was desirous of constructing eighteen hundred "new model muskets" per annum, could he do it with the aforesaid means? If not, what additional means would be required for the purpose?

Interrogatory 21. Was it possible for the claimant to construct a musket of the new model kind without first having in his possession one such musket for a pattern? and at the time when he commenced the manufacture of the said musket could he possibly obtain such musket anywhere except at one of the United States armories?

Interrogatory 22. What would be the probable capital necessary for such an establishment as was that of Mr. Nippes, including only in your estimate the cost of converting it from a manufactory of the old model musket to a manufactory of the new model musket; the purchase of stock and materials, the salaries of officers, and wages of laborers, and amount necessary to preserve the machinery from wear and decay?

Interrogatory 23. Have you at any time as public inspector of arms inspected the work of the claimant? If yea, say when, and in what was the character of said work?

Interrogatory 24. Supposing that the claimant, with everything ready for the reception of such pattern musket, was obliged to wait three months for its reception, and then obliged to spend a whole additional year in the construction of the tools and machinery necessary for its manufacture, what (speaking, if not accurately, yet within the bounds of certainty,) would be to him the average cost per musket of each "new model musket" manufactured and delivered by him, as follows:

800 in the first year, *thereafter*, 1,000 in the second year, 600 in the third year, 1,000 in the fourth year, and six hundred in the fifth year; including, also, in your estimate, the charge for superintendence and salaries of subordinate officers, interest on the capital employed, insurance against all risk, and a reasonable allowance for wear and decay of machinery?

Interrogatory 25. What, to a private manufacturer for the government, would be a reasonable profit per musket upon each new model musket manufactured by him?

Interrogatory 26. What price per musket, of 4,000 muskets, the manufacture and delivery of which is restricted to 800 muskets per annum, the first year including the period when the said musket (the new model) was introduced into the United States, would you consider as equivalent to $14 50 per musket of 5,400 muskets, to be manufactured and delivered in three years, the first year commencing after the establishment was completely organized and in full operation?

Interrogatory 27. Do you know any other matter relative to the claim in question?

JOHN S. TYSON,
Attorney and Counsel for Claimant.

I have no questions to ask.

JNO. D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Deposition of Samuel Lehman.

Interrogatories on the part of the claimant to be propounded to Samuel Lehman:

Interrogatory 1. What is your name, occupation and age? What has been your place of residence for the past year?

Answer. My name is Samuel Lehman, my occupation that of a gunsmith, and my age forty-five years; my place of residence for the past year, Springfield, Hampden county, Massachusetts.

Interrogatory 2. Have you any interest, direct or indirect, in the claim which is the subject of the present inquiry?

Answer. I have none, whatever.

Interrogatory 3. Are you in any degree related to the claimant.

Answer. I am not.

Interrogatory 4. How long has the above been your occupation? and where have you been so occupied?

Answer. Twenty-five years; and for the last fifteen years have been employed at said business in the national armory at Springfield; and for ten years previously was so employed in Philadelphia, Valley Forge, and at Millcreek, near Philadelphia.

Interrogatory 5. Were you ever employed by the claimant in the

business of manufacturing fire arms? If yea, say when and how long.

Answer. I have, and at the several places mentioned in my answer to the 4th interrogatory, above. I was first in employ of W. S. Evans, then James Baker, and afterwards Daniel Nippes; and fifteen years ago came to the Springfield armory. I was employed by said Nippes about four years, just prior to my coming to Springfield. All the work, however, that I have done for the claimant, has been at Philadelphia and Millcreek.

Interrogatory 6. Were you engaged by him in making preparations for the manufacture of "the new model musket?" If yea, what were those preparations?

Answer. I was so employed by the claimant in making such preparations. I was engaged in his business in all about four years, and the latter part of this time I worked on tools and machinery, preparatory for "the new model musket; I mean the model of 1840. The tools and machinery were about all new, a change from model of 1822, and I assisted in all these preparations, or a considerable part of them. His armory at Millcreek was a new establishment, and the first work done there by the claimant was on "the new model of 1840;" machinery, tools, and fixtures were about all new. On Mr. Nippes's site at Millcreek, he had a long time before done some work for private contractors in the way of boring and turning barrels, and polishing the parts of the musket, in one or two small buildings, but these were all cleared away and a proper or suitable armory established.

Interrogatory 7. At what time did the claimant receive from the United States a "new model musket," as a pattern by which to manufacture the same or similar article? How long a space of time (if any) elapsed between the period when his preparations for receiving it were fully made and the period of its reception?

Answer. I cannot state the time when claimant received the pattern, for I do not remember; but well remember that there was delay about receiving it, and perhaps complaint. His old hands, or employees, were mostly scattered abroad; a few he kept at work on tools and machinery to keep them employed, while he was waiting for his pattern; a long time elapsed, several months, after his works were in readiness, and some preparations made before he received a pattern for "the new model musket."

Interrogatory 8. Were you fully employed during all that interval? How many armorers or mechanics were then employed by the claimant? What were their respective salaries? Did the claimant rent the establishment in which you worked? if yea, what was the rent per annum? State also any other expenses of said establishment, which the claimant was bound to pay during the said interval, and the probable aggregate of all.

Answer. I was not fully employed, and do not remember how many men were employed during this period; but the workmen were all on *short work*, who remained, and some had left; about this time the wages of men were from one dollar to two dollars per day; I used to hear it talked about. His rent in Philadelphia would be about $300 per annum; at Millcreek he owned the works. The claimant, during

all this interval, was at considerable expense, aside from getting up tools, machinery, &c. He was necessarily obliged to travel about.

Interrogatory 9. What space of time elapsed between the period of the reception of the "new model" pattern and the period when the claimant was ready to go on, and did go on regularly with the manufacture of said arm?

Answer. About one year, according to the best of my recollection.

Interrogatory 10. What was the probable expense incurred by the claimant during that period?

Answer. His expenses must have been considerable, aside from those of fitting up his establishment or armory, as I have already stated under interrogatory 8. The delay in obtaining his pattern for the new model, occasioned much expense and loss of time, for he was obliged to make journeys to Springfield and other places, for the purpose of expediting the business in relation to patterns of different tools, fixtures, and machinery for the new musket. I left Mr. Nippes in 1842, while his tools and machinery were being put forward.

Interrogatory 12. From your experience and knowledge as an armorer, your knowledge of the claimant's manufactory and business, and the peculiar circumstances which surrounded him, superinduced by his engagement with the United States, and allowing him a reasonable profit, what would you consider a reasonable price per musket for 4,000 muskets of the new model kind, manufactured by him in the best style, and deliverable in not less than five years, at the rate of 800 muskets per year?

Answer. In my judgment $18 per musket would be a reasonable price, under all the circumstances mentioned in this interrogatory.

Interrogatory 13. What capital was, or would be, necessary to carry on such an establishment as was the claimant's? What would be a reasonable amount per annum for insurance, and per centage for preserving the machinery from wear and decay?

Answer. I think the whole capital necessarily employed would not exceed $2,000, and that 10 per cent. would be a reasonable allowance for insurance and for wear and decay of machinery, fixtures, and tools. I mean ten per cent. for preserving such from wear and decay, and for insurance.

Interrogatory 14. What would you consider the fair value per musket of 4,000 muskets (new model) manufactured and delivered in five years, at the rate of 800 muskets per annum, including in your estimate all the cost and expense of manufacturing the same for the first time?

Answer. Eighteen dollars per musket.

Interrogatory 15. With tools, machinery, hands, and other means capable of manufacturing 800 new "model muskets" per annum, how many more, per annum, could be manufactured?

Answer. With a small addition of capital and force, he might make 1,200, muskets, for he had the shop room, water power, permanent fixtures, and small tools sufficient.

Interrogatory 16. Was it possible for the claimant to manufacture "the new model musket" at a cost less than that which attended its

construction at the Springfield armory during the first five years of its manufacture?

Answer. It is my opinion that he could not.

Interrogatory 17. What would be a fair average profit per musket on 4,000 new model muskets, manufactured and delivered in 1841, 1842, 1843, 1844, and 1845, at the rate of 800 muskets per annum?

Answer. I think five dollars per musket would be such fair average profit; and after all the reflection and investigation I have been able to bring to it, I give that as my opinion and judgment, in reference to this interrogatory.

Interrogatory 18. Do you know any other matter relative to the claim in question?

Answer. I do not.

SAMUEL LEHMAN.

STATE OF MASSACHUSETTS, *County of Hampden, ss:*

On this sixth day of February, A. D. 1858, personally came Samuel Lehman, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Samuel Lehman, taken at the request of Daniel Nippes, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in thename of Daniel Nippes. The adverse party was notified did not attend, and did not object.

JAMES W. CROOKS,
Commissioner.

Fees of witness, $5; travel, 2 miles; attendance, 4 days; commissioner's fees, $10.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Interrogatories on the part of the claimant to be propounded to Samuel Lehman:

Interrogatory 1st. What is your name, occupation, and age? What has been your place of residence for the past year?

Interrogatory 2d. Have you any interest, direct or indirect, in the claim which is the subject of the present inquiry?

Interrogatory 3d. Are you, in any degree, related to the claimant?

Interrogatory 4th. How long has the above been your occupation? and where have you been so occupied?

Interrogatory 5th. Were you ever employed by the claimant in the business of manufacturing firearms? If yea, say when and how long?

Interrogatory 6th. Were you engaged by him in making preparations for the manufacture of "the new-model musket?" If yea, what were those preparations?

Interrogatory 7th. At what time did the claimant receive from the United States a "new model musket" as a pattern by which to manufacture the same or similar article. How long a space of time, if any, elapsed between the period when his preparations for receiving it were fully made, and the period of its reception?

Interrogatory 8th. Were you fully employed during all that interval? How many armorers or mechanics were then employed by the claimant? What were their respective salaries? Did the claimant rent the establishment in which you worked? if yea, what was the rent per annum? State also any other expenses of said establishment which the claimant was bound to pay during the said interval, and the probable aggregate of all.

Interrogatory 9th. What space of time elapsed between the period of the reception of the "new model" pattern, and the period when the claimant was ready to go on and did go regularly with the manufacture of said arm?

Interrogatory 10th. What was the probable expense incurred by the claimant during that period?

Interrogatory 12th. From your experience and knowledge as an armorer, your knowledge of the claimant's manufactory and business, and the peculiar circumstances which surrounded him, superinduced by his engagement with the United States, and allowing him a reasonable profit, what would you consider a reasonable price per musket for 4,000 muskets of the new model kind, manufactured by him in the best style, and deliverable in not less than five years, at the rate of 800 muskets per year?

Interrogatory 13th. What capital was, or would be, necessary in order to carry on such an establishment as was the claimants? What would be a reasonable amount per annum for insurance, and per centage for preserving the machinery from wear and decay?

Interrogatory 14th. What would you consider the fair value per musket of 4,000 muskets (new model) manufactured and delivered in five years, at the rate of 800 muskets per annum, including in your estimate all the cost and expense of manufacturing the same for the first time?

Interrogatory 15th. With tools, machinery, hands, and other means, capable of manufacturing 800 new "model muskets" per annum, how many more per annum could be manufactured?

Interrogatory 16th. Was it possible for the claimant to manufacture "the new model musket" at a cost less than that which attended its construction at the Springfield armory during the first five years of its manufacture?

Interrogatory 17th. What would be a fair average *profit* per musket on 4,000 new model muskets manufactured and delivered in 1841, 1842, 1843, 1844, and 1845, at the rate of 800 muskets per annum?

Interrogatory 18th. Do you know any other matter relative to the claim in question?

JOHN S. TYSON,
Attorney and Counsel for the Claimant.

I have no questions to ask.

JNO. D. McPHERSON.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Testimony of William C. Reddall, for the claimant, taken before Edmund F. Brown, Cnmmissioner for the District of Columbia.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

On the twenty-second day ot December, A. D. eighteen hundred and fifty-eight, personally came William C. Reddall, esq., the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The adverse party was notified, did not attend, but sent his cross-interrogatories which are hereunto attached.

EDM. F. BROWN,
Commissioner of the Court of Claims.

Fees of witness—	
Atttendance, one day, at $1 50 per day.....	$1 50
Commissioner's fees—	
Taking testimony, 8 pages, 1,747 words, at 20 cents per 100..	$3 49
One oath.....	10
	3 59

The deposition of William C. Reddall, taken at the request of John S. Tyson, esq., counsel for the claimant, before Edmund F. Brown, commissioner for the District of Columbia, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of Daniel Nippes *vs.* United States.

First general interrogatory by the commissioner: Please to state your name, your occupation, your age, your place of residence the past year; whether you have any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, you are related to the claimant?

Answer. My name is William C. Reddall. My occupation, clerk in the Department of State. My age is fifty years. My residence the past year, Washington city. I have no interest, direct or indirect, in

the claim which is the subject of inquiry, and am in no degree related to the claimant.

First interrogatory by the counsel for the claimant. Were you at any time, and during what time, a clerk in the ordnance office?

Answer. I was a clerk in the ordnance office from December, 1838, to January, 1846.

2d interrogatory. What were your peculiar duties? Was the drawing of contracts one of those duties?

Answer. My duties were, the examining of army returns, the registry of the daily mail, and the drawing of contracts.

3d interrogatory. Under whose direction were those contracts drawn?

Answer. I was directed to draw them by George Talcott, lieutenant colonel of ordnance, under the sanction of the Secretary of War.

4th interrogatory. Have you any recollection of having during the years 1840 and 1841 drawn any contract or contracts between the government and manufacturer of arms in relation to the manufacture of a new and peculiar form of musket, commonly known as the "new model musket?"

Answer. Yes; with Lemuel Pomeroy, of Pittsfield, Massachusetts, and Daniel Nippes.

5th. interrogatory. Were these several contracts like each other in substance and terms?

Answer. Yes, they were.

6th interrogatory. Have you any recollection of having prepared such a contract between Lemuel Pomeroy and the government? If yea, state when?

Answer. I drew such a contract, I think about the commencement of the year 1840.

7th interrogatory. Was, or was not, that contract used as a model for the formation of all other contracts with private manufacturers for the manufacture of the new model muskets.

Answer. Yes, it was.

Interrogatory 8. Have you any knowledge of Daniel Nippes, the claimant, as a manufacturer of muskets for the government? If yea, state such knowledge, particularly as to his being employed in the manufacture of the "new model musket," how many and upon what terms?

Answer. I was acquainted with Mr. Nippes some time before 1840, he having been engaged in the manufacture of the old model muskets Some time in 1840, I think during the summer, Mr. Nippes came to the office and was promised by Lieut. Col. Talcott, then in charge of the Ordnance department, that he, Nippes, should have a contract for the manufacture of eight hundred of the "new model musket" per year for five years, and that he should proceed to the manufacture of them.

Interrogatory 9. Have you recollection of having been instructed by the Ordnance department to prepare the form of a contract between the government and Mr. Nippes for such manufacture; if yea, state as nearly as you can the terms and conditions of said proposed contract?

Answer. Such a contract was prepared by me under the instructions of Colonel Talcott, and the terms and conditions of it were precisely

similar to terms and conditions of the contract with Mr. Pomeroy, of Pittsfield, Massachusetts.

Interrogatory 10. Was it signed by the contracting parties? If not, explain the reason why?

Answer. It was not. The reason why it was not signed was, there was some conversation as to extending the number of muskets that Mr. Nippes was to make over the eight hundred per annum which was promised by the department, which addition he was led to believe would be upon the same terms and conditions. My impression is, that he was to have one thousand per annum instead of eight hundred, and that was the reason the contract was not then signed.

Interrogatory 11. Have you read the fourth article of the first contract with Pomeroy, as set forth in the petition of the claimant? If yea, please state whether the article was in substance a part of the contract which you were as above directed to draw between the claimant and the government?

Answer. I have read said fourth article of said contract with Pomeroy, as set forth in the petition of the claimant, and find that it is the same in substance as the one which I was directed, as above to draw between the claimant and the government.

Interrogatory 12. Was it understood by the Ordnance department, after the manufacture of the "new model musket" was determined upon, at least up to the time when said form of a contract between the claimant and the government was made out by you, that the terms contained in said fourth article of Pomeroy's contract were to be the terms of every undertaking for the manufacture of the "new model musket?"

Answer. It was so understood.

Interrogatory 13. Was it understood at all times that such were the terms upon which the claimant originally undertook the said manufacture?

Answer. It was.

Cross-interrogatories by the deputy Solicitor.

Cross-interrogatory 1. If your answer to the last clause of the 14th interrogatory is in the affirmative, state what other contracts were drawn and executed, embracing the terms of the fourth article of Pomeroy's first contract?

[*Note by the commissioner.* This refers to the 12th interrogatory above.—E. F. B.]

Answer. None were executed excepting Pomeroy's.

Cross-interrogatory 2. When did you draw the contract referred to in the 12th and 13th interrogatories? [8th and 9th here.—E. F. B., com'r.]

Answer. In the summer of 1840, as stated in my answer to the 8th interrogatory, the contract was promised, but was not drawn until the fall of 1841.

Cross-interrogatory 3. Was Mr. Nippes willing at the time to execute the contract as drawn by you? Did he not voluntarily defer signing it in the hope that the number of muskets would be increased?

Answer. He was willing to sign it, and deferred it at the request of the Ordnance department, in the expectation of an increase of two hundred additional muskets per annum, as suggested by Col. Talcott.

Cross-interrogatory 4. If you answer the last clause of the 14th interrogatory (11th in this) in the affirmative, state how settlements were made with the contractors therein referred to? State whether the cost of the musket at Springfield was ascertained, and whether the cost so ascertained was ever paid to any contractor?

Answer. I am not able, from my own knowledge, to answer any part of this interrogatory.

Cross-interrogatory 5. Have you knowledge of any case other than those of Pomeroy and Nippes in which a manufacturer of small arms entered into a contract for the manufacture of muskets of the "new model," in which the price to be paid was what the muskets would cost at Springfield armory, and in which that price was paid? If so, please give the name of the manufacturer; if you cannot name him, please endeavor to designate him, that the settlement with him can be found and referred to?

Answer. I have no knowledge of any persons, excepting Pomeroy and Nippes, having contracts for the manufacture of the "new model musket."

2d general interrogatory by the commissioner. Do you know of any other matter relative to the claim in question? If you do, state it.

Answer. I do not.

W. C. REDDAL.

Sworn to and subscribed before me, this 22d day of December, 1858.

EDM. F. BROWN,
Commissioner of Court of Claims.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Interrogatories to be propounded to William C. Reddall.

Interrogatory 1. What is your name, occupation, age, place of residence for the past year?

Interrogatory 2. Have you any interest, direct or indirect, in the claim which is the subject of inquiry?

Interrogatory 3. Are you in any degree related to the claimant?

Interrogatory 4. Were you at any time, and during what time, clerk in the Ordnance department?

Interrogatory 5. What were your peculiar duties? Was the drawing of contracts one of those duties?

Interrogatory 6. Under whose direction were those contracts drawn?

Interrogatory 7. Have you any recollection of having, during the years 1840 and 1841, drawn any contracts between the government and manufacturers of arms in relation to the manufacture of a new and peculiar form of musket, commonly known as the "new model musket."

Interrogatory 8. Were these several contracts like each other in their substance and terms?

Interrogatory 9. Have you any recollection of having prepared such a contract between Lemuel Pomeroy and the government? If yea, state when.

Interrogatory 10. Was or was now that contract used as a model for the formation of all other contracts with private manufacturers for the manufacture of the "new model musket?"

Interrogatory 11. Have you any knowledge of Daniel Nippes, the claimant, as a manufacturer of muskets for the government? If yea, state such knowledge, particularly as to his being employed to manufacture "the new model musket," how many and upon what terms.

Interrogatory 12. Have you recollection of having been instructed by the Ordnance department to prepare the form of a contract between the government and Mr. Nippes for such manufacture? If yea, state, as nearly as you can, the terms and conditions of said proposed contract.

Interrogatory 13. Was it signed by the contracting parties? If not, explain the reason why.

Interrogatory 14. Have you read the fourth article of the first contract with Pomeroy as set forth in the petition of the claimant? If yea, please state whether that article was, in substance, a part of the contract which you were, as above, directed to draw between the claimant and the government? Were these the terms of all the other contracts for the same object?

Interrogatory 15. Was it understood by the Ordnance department, after the manufacture of the model musket was determined on, at least up to the time when said form of contract between the claimant and the government was made out by you, that the terms contained in said fourth article of Pomeroy's agreement were to be the terms of every undertaking for the manufacture of "the new model musket?"

Interrogatory 16. Was it understood at all times that such were the terms upon which the claimant originally undertook the said manufacture? Do you know any other matter or thing in relation to this claim?

Cross-interrogatories.

1. If your answer to the last clause of the 14th interrogatory is in the affirmative, state what other contracts were drawn and executed embracing the terms of the 4th article of Pomeroy's first contract.

2. When did you draw the contract referred to in the 12th and 13th interrogatories?

3. Was Mr. Nippes willing at the time to execute the contract as drawn by you? Did he not voluntarily defer signing it in the hope that the number of muskets would be increased?

4. If you answer the last clause of the 14th interrogatory in the affirmative, state how settlements were made with the contractors therein referred to. State whether the cost of the musket at Springfield armory was ascertained, and whether the cost so ascertained was ever paid to any contractor.

5. Have you knowledge of any one case, other than those of Pomeroy and Nippes, in which a manufacturer of small arms entered into a contract for the manufacture of muskets of the new model in which the price to be paid was that the musket would cost at Springfield armory, and in which that price was paid? If so, please give the name of the manufacturer? If you cannot name him, please endeavor so to designate him that the settlement with him can be found and referred to.

JOHN D. McPHERSON,
Deputy Solicitor.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Testimony of Rev. John Robb, for the claimant, taken before Edmund F. Brown, commissioner for the District of Columbia.

DISTRICT OF COLUMBIA, *County of Washington, ss.*

On the twenty-second day of December, A. D. eighteen hundred and fifty-eight, personally came Rev. John Robb, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The adverse party was notified, did not attend, but sent his waiver, which is hereunto attached.

EDM. F. BROWN,
Commissioner of the Court of Claims.

Fess of witness—

Attendance one day, at $1 50 per day.....	$1 50

Commissioner's fees—

Taking testimony, 5 pages, 1,279 words, at 20 cents per 100...	$2 55
1 oath.....	10
	2 65

The deposition of John Bobb, taken at the request of John S. Tyson, counsel for the claimant, before Edmund F. Brown, commissioner for the District of Columbia, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Daniel Nippes *vs.* United States.

1st general interrogatory by the commissioner. Please to state your name, your occupation, your age, your place of residence the past year; whether you have any interest, direct or indirect, in the claim

which is the subject of inquiry; and whether and in what degree you are related to the claimant?

Answer. My name is John Robb; my occupation, chief clerk in the Pension Office; my age is over sixty years; my residence the past year, Washington city. I have no interest, direct or indirect, in the claim which is the subject of inquiry; and am in no degree related to the claimant.

1st interrogatory by the counsel for the claimant. Had you at any time the principal charge of the armory at Springfield, Massachusetts? If yea, say what and when.

Answer. I was the superintendent of the Springfield armory from the first day of November, 1833, to about the middle of April, 1841.

Interrogatory 2. Was Elizur Bates under your employ in said armory? If yea, say in what situation; what was his skill and capacity; and what was his general character for truth, faithfulness, and integrity?

Answer. He was master armorer under my superintendence from January, 1834, until the spring or summer of 1837, when he voluntarily resigned that position. He was subsequently, however, employed in the armory in a different capacity. I considered him an excellent workman, and a firstrate master armorer as to skill and ability; and such was my opinion of his truth, faithfulness, and integrity, that he would compare favorably with any other man within my knowledge. He was a man of strict integrity and a high sense of honor.

Interrogatory 3. What was your salary?

Answer. During the latter years of my superintendency, my salary was fifteen hundred dollars per annum and four rations per day commuted, making seventeen hundred and ninety-two dollars per annum.

Interrogatory 4. Was the manufacture of the arm called the "new model musket" commenced while you were so as aforesaid employed in said armory?

Answer. It was.

5th interrogatory. What was the cost per musket of manufacturing the old musket; that is, the one in use immediately preceding the adoption of the "new model?"

Answer. While I was there the cost of the old model musket varied from twelve dollars and thirty cents down to ten dollars and about eighty cents each; this cost did not include the interest upon the capital invested in ground, buildings, tools, machinery, and wear and tear.

6th interrogatory. What was the cost per musket of manufacturing the "new model musket?"

Answer. I cannot state precisely the cost of the "new model musket" while I was there, as it is impossible to tell, for the reason that the work was all paid for by the day and not by the piece; in 1840 there were less than six thousand muskets finished, about seven hundred of which were the "new model muskets" and the remainder the old model; the average cost of each musket was, I think, in my report to the Ordnance department, stated to be sixteen dollars and eighty cents each.

7th interrogatory. What caused the difference in expense in the manufacture of the two kinds of muskets?

Answer. The different parts of the musket being entirely different, the machinery and tools required to be altered, and many new ones to be made, which involved considerable expense, as the work had to be done by the day until the establishment of a tariff of prices for piece work upon the muskets. This refers to the "new model."

8th interrogatory. Have you any knowledge of the claimant as a manufacturer of muskets for the United States, either of the old or the "new model?"

Answer. I have not.

9th interrogatory. What do you think would be a reasonable profit, per musket, for the manufacture of the "new model musket?"

Answer. If I had the necessary buildings, machinery, and tools, I would not be willing to manufacture eight hundred per year for less than three dollars profit on each.

Second general interrogatory by the Commissioner.

Do you know of any other matter relative to the claim in question? If you do, state it.

Answer. I do not.

JOHN ROBB.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Interrogatories to be propounded to John Robb.

Interrogatory 1. What is your occupation, age, and place of residence for the last year?

2. Have you any interest, direct or indirect, in the claim which is the subject of inquiry?

3. Have you any interest, direct or indirect, in the claim which is the subject of inquiry?

4. Are you related, in any degree, to the claimant?

5. Had you at any time the principal charge of the armory at Springfield? If yea, say what and when.

6. Was Elizur Bates under your employ in said armory? If yea, say in what situation. What was his skill and capacity, and what was his general character for truth, faithfulness, and integrity?

7. What was your salary?

8. Was the manfacture of the arm called the "new model musket" commenced while you were so as aforesaid employed in said armory?

9. What was the cost, per musket, of manufacturing the old musket; that is, the one in use immediately preceding the adoption of the new model?

10. What was the cost of manufacturing the new model musket?

11. What caused the difference in expense, having reference to new buildings, new tools, new stocks, and other constituents?

12. Have you any knowledge of the claimant as a manufacturer of muskets for the United States, either of the old or the new model?

13. Do you think that the expense of preparing for the manufacture of the "new model musket," and its actual manufacture, would have been materially different in a private manufactory from what it was in a public one? If yea, state such difference.

14. What do you think would be a reasonable profit per musket for the manufacture of the "new model musket," stating it, if you choose, by minimum and maximum?

15. Do you know any other matter relative to the claim in question?

JOHN S. TYSON,
Solicitor for Claimant.

I have no questions to ask this witness.

JOHN D. McPHERSON,
Deputy Solicitor for United States.

Sworn to and subscribed before me this 22d of December, 1858.

[L. S.] EDMUND F. BROWN,
Commissioner of the Court of Claims.

Affidavit of A. S. Nippes.

MONTGOMERY COUNTY, *State of Pennsylvania, ss:*

Before me, the subscriber, a justice of the peace in and for the county and State aforesaid, appeared Daniel Nippes, of Lower Merion township, in said county and State, who being duly sworn according to law, saith on his oath, that about 1837 he became a contractor with the general government for the maufacture and supply of muskets, and the contract then made was performed and settled; that thenceforward he also supplied muskets to the government, up to about the year 1840; that at the period last mentioned, the government adopted a new model or pattern, and he, the said Daniel Nippes, undertook at the instance of said government about that time to manufacture and supply four thousand stands or muskets, and accordingly did supply them; and that he was to have therefor what the manufacture, &c., of such arms cost at the national armories at that time, which cost per musket was seventeen dollars, as he is informed and believes. He further states, however, that he never received more than $14 50 per musket from the government for the whole four thousand that he made and delivered as aforesaid; he further says that the actual cost to him of each of the four thousand muskets, was not less than the sum of seventeen dollars per piece as he verily believes; and that he could not manufacture them for a less sum on the most economical plan and by greatest attention, and that if he is now allowed seventeen dollars, he will still be without any profit.

DANIEL NIPPES.

Sworn and subscribed before me, this 14th of January, 1857.

THOS. W. POTTS, *J. P.*

Before me, the aforesaid justice of the peace, also appeared Albert S. Nippes, who being duly sworn, saith on his oath, that he is the son of the above Daniel Nippes, and was connected with his busness and factory as superintendent for him during the time the four thousand muskets mentioned in his affidavit above written, were made, and that he verily believes that the actual cost of making was not less than seventeen dollars per musket.

ALBERT S. NIPPES.

Sworn and subscribed before me, the 14th January, A. D. 1857.
THOS. W. POTTS, *J. P.*

STATE OF PENNSYLVANIA, *Montgomery county, ss:*

I, Bonyer Brooke, prothonotary of the court of common pleas of said county of Montgomery in the State aforesaid, do hereby certify that Thomas W. Potts, esquire, whose genuine signature, in his own proper handwriting, is affixed and subscribed to the foregoing and annexed certificates and affidavits, was at the times of signing the same and now is a justice of the peace in and for said county of Montgomery in the State aforesaid, duly elected, commissioned, and qualified, and legally authorized by law to administer oaths and affirmations; and that full faith and credit are due to all his official acts as such, and that said court is a court of record.

[L. S.] Witness my hand and the seal of said court, at Norristown, January 14, A. D. 1857.

BONYER BROOKE,
Prothonotary.
Per JARED EVANS,
Deputy Prothonotary.

STATE OF PENNSYLVANIA, *Montgomery county, sct:*

Be it remembered, that on this twenty-sixth day of December, A. D. 1857, before the subscriber, justice of the peace of the county and State aforesaid, befere whom the above depositions of Daniel Nippes and Albert S. Nippes were taken, personally appears Daniel S. Nippes and makes oath that since the said 14th day of January, 1857, when the said depositions were taken, to wit, on or about the 14th day of January, A. D. 1857, the said Albert S. Nippes departed this life, and is deceased.

DANIEL S. NIPPES.

Sworn and subscribed before me.

THOS. W. POTTS, *J. P.*

STATE OF PENNSYLVANIA, *Montgomery county, ss:*

I, Florence Sullivan, prothonotary of the court of common pleas of said county of Montgomery in the State of Pennsylvania aforesaid, do hereby certify that Thomas W. Potts, esq., whose genuine signature, in his own proper handwriting, is affixed and subscribed to the within and foregoing certificate, was at the time of signing the same and now is a justice of the peace, duly elected, commissioned, and qualified,

and legally authorized by the laws of said State to administer oaths and affirmations for general purposes; and th full faith and credit are due to all his official acts as such.

[L. S.] Witness my hand and seal of said court, at Norristown, December 26, A. D. 1857.

F. SULLIVAN,
Pronothonoty.

Account of Daniel Nippes.

MILL CREEK, *January* 14, 1857.

The United States government to Daniel Nippes, Dr.

Machinery, tools, &c.....	$3 00	per musket.
Water power (for five years).....	1 25	
Interest on machinery, &c., superintending the manufactory five years, keeping the machinery and tools in order, oil, leather, iron, emery, grindstones, hauling, charcoal, and stone coal.....	2 50	
Barrel and breech.....	3 95	
Bayonet.....	1 09	
Stock.....	1 56	
Lock.....	1 63	
Mounting.....	1 46	
All the forging but barrel.....	3 00	
Manufacturing 4,000 stand, at.....	19 44	per musket, $77,760
Received cash on the above 4,000 muskets.....		58,000
Balance.....		19,760

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Evidence for the United States.

Proceedings of the Department of War upon the claim of Daniel Nippes, printed in Senate Doc. 65, 33d Cong., 1st sess., pp. 36 to 52.

JNO. D. McPHERSON,
Deputy Solicitor.

J. H. Eaton to the Secretary of War.

NOVEMBER 3, 1853.

DEAR SIR: I solicit your attention to the case of D. Nippes, under a contract made with the government for arms. My brief, and the papers enclosed with it and referred to, will present to you the whole

case, and there are but few of them. An examination of them will take up but little of your time.

The larger bundle, containing letters and information from the Ordnance bureau, is sent only as a reference, if deemed necessary. The whole gist of the matter, though, is as to the nature and character of the contract, which I have endeavored in my remarks briefly to explain.

With great respect,

JOHN H. EATON,
Attorney for Nippes.

Colonel J. DAVIS,
War Department.

Case of D. Nippes.

In October, 1841, D. Nippes, of Pennsylvania, entered into a contract with the United States to manufacture eight hundred model muskets in five years—equal in all to four thousand stand—at the price of their cost at Springfield armory.

Nippes, a former contractor for making the old muskets, was informed by the department, *in March*, 1839, that no more engagements would be made for the old muskets, and Nippes was invited to enter on the new model, saying: "The price will be regulated by the results at the armories, and will probably not be less than $15."—(See paper marked No. 1.)

The test, though, being fairly made at the armory, Mr. Bates superintendent, reported the cost of the arm at $16 85.6; but adding in other items of cost, the whole amount would be $17 50.—(See paper A.)

In February, 1840, another manufacturer of arms, who doubtless also was invited to contract, (Lemuel Pomeroy,) entered into a contract for six thousand arms. The altering of machinery, obtaining tools, and necessary preparation, involved heavy outlays of money. Aware of this, the government contracted to allow him $12 50 each stand; meanwhile, within two years from its date, a test should be made at the Springfield armory: "And when the actual cost of manufacturing the musket shall be satisfactorily ascertained, the said Pomeroy shall be entitled to receive from the United States, for each of said six thousand muskets, the sum which the actual cost of manufacturing a musket shall amount to in the Springfield armory, to be ascertained within two years from the date hereof."—(See paper C.)

On the 17th of March, 1842, another contract was made (see C) between the same parties. The two years, as before agreed on, had passed, and the cost was still unascertained; at which time Pomeroy had made and delivered one-third of his engaged number, two thousand stand. It was then agreed in this second contract that for these two thousand, the price should be at $16; and that an additional number of one thousand stand should be assigned to him. And for this extended enlargement it was bargained that the residue of muskets should be at $14 50.

Intermediately between Pomeroy's first and second contract, the Ordnance department contracted with Nippes, viz: *October*, 1841. The cost of the arm, as experimented on at Springfield, was yet unascertained. Nippes, a skilful operator—for the ordnance admits the superior excellence of his muskets—conceived the idea that he could work as well and cheaply as any other manufacturer; and agreed to be controlled by Pomeroy's contract—to receive what should be the cost at Springfield armory. It was not until a lapse of six years after making this contract, and when his deliveries under it were fully made, of four thousand muskets, that the cost of making them at Springfield was ascertained, viz: September, 1847.—(See Bates's, Superintendent, letter A.)

It was competent for the War Department and Pomeroy to change their first contract, but that change can in nowise affect Nippes, who, was no party to it—it could not affect him.

By the letter and spirit of his contract, Nippes was to be paid the amount of price engaged to Pomeroy, by and under his covenant of February, 1840. His second altered contract of the 17th of March, 1842, could not affect Nippes's contract of October, 1841, made five months previously.

That this contract was made is fully shown by the deposition of Nippes, and the statement of Riddle, then a clerk in the Ordnance Department, and now in the State Department. He says: "Nippes was to receive the same *rate* per musket as was paid to Pomeroy, under contract entered into with the Ordnance department by him." Again he says: "I labor under the strong conviction that a contract was drawn by myself, and prepared for signature; but its execution was postponed, as some conversation was had by Mr. Nippes and the then chief of the Ordnance department on the subject of an increased number to be manufactured by Mr. Nippes, over the eight hundred per annum. (See paper marked C 2.)

But had there been a mere assignment of eight hundred guns for five years, and no contract, justice and right would demand that the cost of making, ascertained at their own armory, should be paid by the United States. But it is clearly shown there was a contract, and its terms; and there is further evidence, viz., a letter from Colonel Talcott, of the Ordnance bureau, to a member of Congress from Pennsylvania, dated December 11, 1840, which says:

"Mr. Nippes may safely rely on the letters from the office; and if he complies with what pertains to his share of the business, he may depend *on having a contract.*" (See C 3.)

Against this budget of testimony, how can it be said there was no contract? And yet Secretary Marcy, then of the War Department, in February, 1847, does say:

"That the price of the muskets was fixed by contract—not left conditional, as in the agreement with Mr. Pomeroy, to which he refers as a precedent in his favor, and full payment has been made to him, according to the terms of that contract." (See paper E.)

The error of action in this business has arisen from the fallacious impression that Nippes was to receive *only* what Pomeroy was paid. That is excessively erroneous; there was no such contract. The facts

and circumstances all point to the conclusion that he was to be paid *the actual ascertained cost* at Springfield. Mr. Marcy had not before him the *now newly presented* proof of Nippes and Riddle, who confirm his deposition, or he would clearly have perceived the error of his opinion and declined it. All the facts are in opposition to the conclusion he arrived at, and had they been before him at the time, his opinion must have been different.

Respectfully presented.

JOHN H. EATON,
Attorney for D. Nippes.

Col. J. DAVIS, *Secretary of War.*

NOVEMBER 3, 1853.

4,000 muskets, at $17 50..	$70,000
Paid $14 50.....	58,000
	12,000
Interest from October, 1846, when the whole was delivered.	5,040
Balance due.....	17,040

Secretary of War to J. H. Eaton.

WAR DEPARTMENT,
Washington, November 14, 1853.

SIR: I have received and considered the claim of Mr. D. Nippes, presented by you, for an increased price for muskets made by him, under an order of the Ordnance department, during the years 1841, and 1845.

In reply, I transmit you a report made by the colonel of ordnance, and have to inform you that, as the claim has been once decided by a predecessor, (in 1847,) when all the material facts now presented to me were before him, I can perceive no reason for departing from the rule of the department with regard to re-opening cases once decided, and therefore decline to reconsider it.

Very respectfully, your obedient servant,

JEFFERSON DAVIS,
Secretary of War.

Hon. JOHN H. EATON, *Washington.*

Report from the Colonel of Ordnance.

ORDNANCE OFFICE,
Washington, November 9, 1853.

SIR: I have the honor to report on the case of *Daniel Nippes*, laid before you by his attorney, J. H. Eaton, and referred to this office with the several papers accompanying the claim.

There is no written contract, or order, to be found on the records of

this office, or among the papers presented in support of the claim, which specifies the price, per musket, that Nippes was to receive for making the 4,000 new model muskets. In 1839 it was determined to change the model of the musket as then made; and on the 9th of March, of that year, Mr. Nippes was informed by a letter from Colonel Bomford, chief of the Ordnance department, that 1,760 muskets of the old model were all that would be received from him; also, that he might examine the new model musket at Springfield armory, and determine whether he would go into the manufacture of muskets of that model. He was then told that the price of the new model musket would be regulated by the results of the national armories, and would probably not be less that $15 for the *first* year. No answer appears to have been received to that letter; and no agreement, or bargain of any kind, between the Ordnance department and Mr. Nippes, based thereon, appears to have been made. The only authority which I can find for Mr. Nippes to make the the 4,000 new model muskets for the Ordnance department, is a letter from Colonel Talcott, chief of the Ordnance department to the Hon. Mr. Fornance, M. C., dated October 8, 1840, informing him that it had been the intention of the department to give Mr. Nippes a contract for 800 muskets a year, for five years, but that it had been delayed for fear of rejection of his work; but that if Mr. Fornance felt assured of Nippes's skill and ability, he might begin the manufacture at once. Not a word is said in this letter about the price to be paid to Nippes. In the account kept with Mr. Nippes on the books of this office, the letter to Mr. Fornance of October 8, 1840, is stated to be the authority under which the 4,000 muskets were to be delivered; and the payment for the first two deliveries of 500 muskets, as actually made to Nippes, was $12 50 per musket, with the usual allowance of 25 cents for the appendages. After the delivery of these 500 muskets, viz.: in July, 1842, Mr. Nippes preferred a claim for a higher price per musket than had been paid him. This claim was then examined, and an additional allowance of $2 per musket was recommended to be granted to him, and, on the approval of the Secretary of War, was paid. The reason for this additional allowance on the 500 muskets then delivered, and also that it was to regulate the price of the remaining 3,500 to be delivered, will be found in the enclosed account of D. Nippes, dated July 16, 1842, the original of which is on file in the Second Auditor's office. In this arrangement Mr. Nippes appears to have acquiesced, by going on to deliver the residue of the 4,000 muskets, at the increased price recommended and allowed in the account of July, 1842, and by subsequently applying for and receiving an extension of his order to the amount of 1,600 muskets more at the same price, viz. $14 50 per musket. He appears to have been satisfied with this price, and not to have discovered that he had been paid too little until 1847, when he put in a claim to be allowed the same price that was paid to Lemuel Pomeroy. That claim was referred by Hon. Wm. L. Marcy, Secretary of War, to Colonel Talcott, who had made all the arrangements with Mr. Nippes respecting the manufacture of and payment for the muskets. On his report, a copy of which is enclosed, dated February 13, 1847, the Secretary of War, Mr. Marcy, decided adversely to the claim.

From a full consideration of the claim as now presented, and an examination of all the evidence I can find on the subject, there appears to have been no *formal contract* with Nippes, nor any agreement as to price, (unless it may have been a verbal one, as stated by Colonel Talcott in his report of February 13, 1847, for $12 50 per musket,) except that to be found in the account of July 16, 1842, viz.: $14 50 per musket. Mr. Nippes has been paid at this rate for all the muskets he has delivered. I have no doubt that this price was a fair, indeed a liberal, allowance for the work; and, in my opinion, the claim now set up is neither legally tenable nor supported by equitable considerations.

Mr. Eaton's letter and the accompanying papers are returned herewith.

I am, sir, very respectfully, your obedient servant,

H. K. CRAIG, *Colonel of Ordnance.*

Hon. JEFFERSON DAVIS,
Secretary of War.

J. H. Eaton to the Secretary of War.

WASHINGTON, *November* 16, 1852, ['53.]

SIR: I am aware that your time is of too much importance to the public to be wasted with me in discussing a private right. I will forbear, therefore, to request of you any written response to this, but merely that you will give your consideration to what is here suggested.

1st. The Ordnance office says "there is no contract or order to be found on the records of this office in support of the claim." This is true! and why no contract does appear is fully explained in my first communication. But that fails to molest or change the right. *A verbal* is as valid as a written agreement, if proved. This is done by Mr. Reddall, then a clerk in the Ordnance office, and who was charged to draw up a contract, and which he did. Why it was not taken from the office at the time is fully explained by *his* and Nippes's statement; it was under an expectation that a larger quantity of guns than 4,000 would be assigned by the then Secretary of War.

Then there was a contract, as these statements show, for making this new experimental model gun; and he was to be paid the price contracted for by Pomeroy, with whom a previous contract had been made. That you have amongst the papers. It shows that Pomeroy was to be paid, as he progressed, $12 50 each, and ultimately the price it would cost to make them at Springfield armory; and this was to be ascertained and fixed within two years.

Previous to the end of the two years, (July, 1842,) one thousand additional arms were assigned to Pomeroy, when the first contract made by him was changed; and it was agreed, that for those he had delivered he should be paid $16, and for the residue thereafter $14 50. At a subsequent period the cost at Springfield was found to be $16 $85\frac{6}{10}$. (See Bates's, superintendent, statement.)

Now, if this change had not been made in the contract, Pomeroy would, in virtue of his first, have been entitled to the Springfield cost—$16 85$\frac{6}{10}$. But Nippes's contract referred to Pomeroy's as fixing the price that he should be paid, and could not be affected by anything that was subsequently done by Pomeroy. He could only change his own, not another's bargain. The paper you enclose me from the Ordnance office says: Nippes was paid $12 50 for the first delivery. In *July*, 1842, Nippes preferred a claim for a higher price. This claim was then examined, and an additional allowance of two dollars made. You will perceive that this was the same month (July, 1843) that Pomeroy made his second contract, and who, having bargained at $14 50, it occurred to the colonel of ordnance that Nippes was entitled only to the same, overlooking the fact that his engaged compensation was to be what would be the *cost of their manufacture at Springfield.* It was upon this agreement he worked, and which he has never agreed to change. On a question so plain, I cannot perceive how a legal mind can doubt. I may alter my contract, but a stranger party cannot alter it for me.

On this statement of facts, you remark in your letter "that as the claim has been once decided by a predecessor, (in 1847,) when all the material facts were presented, I can perceive no reason for departing from the rule of the department as to reopening cases." Pardon me for ignorance of your department rules; but certainly they cannot be adverse to the rules as laid down by the Supreme Court; for, if so, then are they repugnant to the supreme law of the land. 15 Peters, p. 401, says: "A reopening may take place on discovery of new testimony or mistake in calculation." Now, in 1847, when this case came before Secretary Marcy, Riddle and Nippes's statements (both veritable men) were not before him. They prove a contract made. Hence there is a new and material evidence, which was not before him. But I repudiate this modern notion of *res adjudicata.* Wherever and whenever it is shown that by decision of a ministerial officer injustice has been done, a revision should take place. The courts constantly grant bills of review to correct errors; government should not be less equitable and just. Its faith should be maintained at any sacrifice, or the ties of its citizens will be loosened. Party discords are of little importance while the confidence of the people is reposed in the justice and integrity of the government. Be that removed, and there will be little left to quarrel about. Affection removed, leaves no rallying point behind.

Very respectfully,
JNO. H. EATON, *Attorney.*

The SECRETARY OF WAR.

Nippes's brief.

He was to be paid what Pomeroy contracted for, viz., $12 50 on delivery, and the further sum of what the musket would cost at the Springfield armory, which was $16 85$\frac{6}{10}$.—(See Bates's statement.)

Pomeroy changed his contract afterwards, on receiving a thousand additional arms to make, the price of which was agreed at $16 for those then delivered, and $14 50 for future ones.

Nippes made a contract in 1847 for four thousand arms, to be delivered in five years, eight hundred annually. That he made such contract is proved by his own and the statement of Mr. Riddle, who at the time was clerk in the Ordnance office, and was directed to write out the contract, and it was so written out.—(See their statements.)

Colonel Craig says, in his report, no contract is to be found in this office. There is proof that one was drawn up, and was not taken out, from an anticipation that the Secretary of War might enlarge the quantity of arms.

He says Nippes was paid $12 50, and afterwards the further sum (in 1847) of $2 addition, and that he acquiesced in the settlement. Of this acquiescence there is no proof offered. He received the two additional dollars, being $14 50; and to that extent only is it an acquiescence.

Be it that he did receive this amount—and it is so admitted—that does not vary his contract to be paid the cost at Springfield. Such was his contract, and a payment of a less sum does not vary it. Pomeroy was to be so paid, and Nippes was to be paid the price agreed to be paid to Pomeroy. A change by him has no bearing on Nippes!

Pomeroy changed his contract on a consideration, viz., one thousand additional arms—$16 for those delivered, and $14 50 for and on account of any future delivery.

How can this after engagement affect Nippes, who was no party to this subsequent contract? This is the *whole* and the *only* point in the case. The response is plain; he is, under his contract, entitled to receive the shown cost of the musket at the armory, viz, $16 $85\frac{6}{10}$, less the amount already paid to him of $14 50. Balance, $2 $35\frac{6}{10}$, on 4,000 muskets, equal to $9,424.

JOHN H. EATON, *Attorney*.

Pomeroy's contract is the 17th February, 1840. He was to be paid what would be its cost at Springfield, which was $17 50.

Two years was the time within which the cost was to be ascertained, viz., by February, 1842.

In March, 1842, the two years being expired, and the cost not yet ascertained, Pomeroy made a second contract, and obtained an additional one thousand guns to make. (See his two contracts, B and Z.) In that it was agreed to pay him for 2,100 guns $16, and for the residue (balance of 7,000) at $14 50, and a second agreement to that effect was entered into. (B.)

Between the dates of these two contracts of Pomery, D. Nippes was engaged also to make arms, (December, 1840,) eight hundred for five years, in all four thousand, who was to be paid the same that was engaged to Pomeroy—*the cost at Springfield*. Now, the change made by Pomeroy in his second contract of March, 1842, cetainly cannot affect Nippes's contract of December, 1840. The letters of Colonel

Talcott of October 8, and December 11, 1840, (marked Nos. 8, 9,) show a contract with Nippes to be intended and desired.

Mr. Riddle, (deposition on file, marked C 231,) who was a clerk in the Ordnance office, drew up a contract under direction of its head. Nippes did not take it away, but proceeded to make, and did fill out, his four thousand muskets engaged for, which the government received and were entirely satisfied with. The only question is to the price he has been paid—$14 50. He claims an additional *three* dollars, the cost of the arm at Springfield being $17 50.

J. H. EATON,
Counsel for D. Nippes.

The whole delay being occasioned by the government, interest ought to be allowed. E.

Daniel Nippes, in 184 , contracted with the War Department for the manufacture of muskets according to the terms of a former contract with Mr. Pomeroy, in February, 1840, which contract stipulated the price at $12 50 each, or making allowance for cost of machinery, &c., and interest for capital invested, at the *cost of the musket* at the United States armory at Springfield.

Pomeroy and Nippes both received less than what was subsequently ascetained to be the cost at the United States armory, viz: $17 50. Nippes received but $14 50 each, 4,000 muskets, but still considers himself entitled, under the terms of his contract, to the difference, three dollars.

Four thousand muskets at $3, making $12,000, for which he claims payment.

Decision of the Secretary of War on the claim of Daniel Nippes.

The principal facts necessary to an understanding of this case, are as follows:

On the 9th of March, 1839, the colonel of ordnance, in giving Mr. Nippes an order for 1,000 muskets of the old model, informed him that no more of that description of arms would be needed, but that if he chose to undertake the manufacture of new-model muskets, he could have a pattern, &c., and the price, which would be regulated by the cost of the same arms at Springfield, would probably be not lesss than $15, for the first year.

Much correspondence took place the following year in regard to furnishing the pattern and giving an order for the arms. Mr. Nippes appearing to think that the former was unreasonably delayed, and that the colonel of ordnance, who had intimated doubts of his willingness or ability to get up the necessary machinery, did not intend to give him an order. However, on the 8th October, 1840, the colonel wrote to Hon. J. Fornance, who was acting for Nippes, that it had been his intention to give Mr. Nippes a contract for 800 muskets a year for five

years, and that if Mr. Fornace felt assured of Nippes's skill and ability to execute the work, the latter might begin at once, but that an inspection would be made as soon as he had 200, or less number, at his option, ready for examination, with a view to ascertain whether he would be able fulfil a contract.

In January, 1842, Mr. Nippes delievered 200, and in June, 300 muskets, which were pronounced perfectly satisfactory, and he was paid $12 50 for each. He then came to this city, and when here, on the 14th July, 1842, wrote to the department, saying that it was important for him to have a certain contract both as to number and price, and asking an order to make 1,800 muskets a year for five years, from January 1, 1843, at $14 50 each. On the first of July, the department declined to increase the order. On the 14th of July, an account was stated in the Ordnance bureau in favor of Mr. Nippes against the United States, "for allowance on 500 muskets delivered under his assignment of October 8, 1840, at $2 each, 1,000." This account was submitted by the Ordnance office, with the explanation that the assignment of 800 muskets a year for five years was made to Mr. Nippes on the 8th of October, 1840, at the conditional price of $12 75; that the price was found to be inadequate, and "it has now been established at $14 75, viz: $14 50 for the muskets, and twenty-five cents for the appendages, at which price the 500 already delievered and those hereafter to be delivered are to be paid for." This account being approved by the Secretary of War, Mr. Nippes, in person, received the amount therein charged, and for the muskets subsequently delivered he received the price therein stated, $14 50 each.

In February, 1847, he applied to the Secretary of War for a further allowance, claiming that he was entittled to the cost of the arms at Springfield, but the Secretary (Mr. Marcy) decided that the price had been fixed by contract, and that payment had been made according to that contract. General Eaton now endeavors to show that there was a contract between Nippes and the Ordnance department, identical in terms with that made in February 1840, between Mr. Pomeroy and that department for muskets of the same kind, according to which the price was to be the cost of such arms at the national armories. The evidence upon which Gen. Eaton relies is that of Mr. Reddall, who was a clerk in the Ordnance office, and who, in a letter, to him, dated February 25, 1850, says, "he is not certain that Mr. Nippes manufactured muskets under *an assignment*, as he labors under a strong conviction that such a contract was drawn by him and prepared for signature," but its execution was postponed, as some conversation was had by Mr. Nippes and the then chief of the Ordnance department upon the subject of an increased number to be manufactured by Mr. Nippes over the 800 per annum. He adds, that of this, however, he is certain Mr. Nippes was to receive the same rate that was paid to Mr. Pomeroy, &c.

If this statement stood alone, it would be far from establishing the contract sought to be set up. It is made from memory, after the lapse of ten years; the writer does not speak with any degree of certainty, and he states that the contract was not executed on grounds fatal to its

validity—the non-agreement of the parties as to the number of arms, which was just as essential as price.

But whatever was the circumstance under which this contract was drawn and not executed, there is abundant proof that neither party ever considered it for a moment to be in force. It is not alluded to in any manner in the letters of Mr. Nippes, or in the reports of the colonel of ordnance to the department, respecting the agreement with him for the manufacture of arms, while on the other hand the following circumstances conclusively negative the idea of its existence:

Mr. Nippes (in a statement marked D) refers to the transaction stated by Mr. Reddall, and a conversation with Mr. R. on the subject which he says took place in 1840, and he says that the contract now set up was offered him by the Secretary of War, and that he declined it, on account of the small amount of the order—only eight hundred muskets per annum for five years. It would be utterly unreasonable for Mr. Nippes now to attempt to enforce a contract, which, by his own showing, he refused to accept; but the after correspondence conclusively shows that neither party consider the department pledged to that offer, or that it was binding in any shape.

This negotiation was three or four months previous to September 2, 1840, (see Fornance's letter of that date and Mr. Nippes's statement D,) say in May.

On the 14th May, 1840, Mr. Nippes writes that he has not yet the patterns to make the machinery for the new model musket; that even if he had the patterns it would take him several months to get ready to go on, and he asked an order *to continue to make old model muskets.* The request was declined June 9. On the 20th of June the Hon. Mr. Fornance communicates *Mr. Nippes's fears that he is to have no work,* whether he prepares or not.

On the 30th of July, he says: "I have just written to Colonel Talcott relative to the model musket, and also relative to the quantity of arms that are to be allowed Mr. Nippes. I do sincerely hope the model will be sent on soon, and that Mr. Nippes will be allowed a reasonable contract."

The answer to this, August 1st, states that the model should be sent soon, and *nothing has been settled with regard to the number, except that he should be allowed eight hundred.*

On the 6th October, Hon. Mr. Fornance writes: "I will undertake to say for Mr. Nippes that if you will give him *orders to make sixteen hundred muskets* (which will be two years' work, as I formerly understood it, and as one year has how elapsed it would be nothing more than right) of the new model, *he will not ask the department for any more work.*"

On the 8th of October, 1840, the letter hereinbefore referred to was addressed to the Hon. J. Fornance, to the effect that if Mr. Nippes would make two hundred muskets, or less, for inspection, and *if they proved satisfactory* Mr. Nippes should have a contract to furnish eight hundred muskets a year for five years.

On the 9th of December Mr. Fornance wrote to the colonel of ordnance that *he had communicated the letter of the 8th of October to Mr.*

Nippes, and had expressed his opinion that the government would act fairly with him if he would complete two hundred muskets for inspection, and advised to go on with the work ; that Mr. Nippes's fears had been alarmed by the result of the late election. "He says he has no written contract," and "wishes to be made more secure." "*A conditional contract, containing all that your letter to me contained, would satisfy Mr. Nippes*," &c.

To this the colonel of ordnance replies the 11th of December, 1840; "Mr. Nippes may *safely rely on the letters from this office, and if he complies with what pertains to his share* of the business, he may depend on having a contract. It is not usual to make conditional agreements in any other way than that which has been followed in his case," &c.

The course of his correspondence is entirely incompatible with the idea that any such agreement had been entered into, or that the department was willing to make such an agreement ; and, moreover, if the department had offered Mr. Nippes a contract for four thousand muskets, and he had refused it, on account of the smallness of the number, it is inconceivable that he should have made no allusion to that circumstance when he was pressing four months afterwards for an order to make only sixteen hundred. Had such been the facts, he could not have refrained from saying, four months ago you offered me four thousand, now I ask only sixteen hundred. His silence upon that subject on that occasion is conclusive, but if any confirmation were needed, it would be found in the statement sent by his son, Mr. Albert S. Nippes, with his father's respects, to the Hon. Mr. McNair, July 17, 1852. In this it is stated that "after Mr. Nippes had received Colonel Bomford's letter of the 9th March, 1839, and had got sufficiently along with the muskets that he was then manufacturing of a different model, he went to Springfield armory in July, 1840; he examined the model and the government machinery to manufacture the new muskets, and then came back and wrote to the government, July 20, 1840, for a model to get up the tools and machinery by ; also requests in the same letter a contract as large as the government has extended to the other manufacturers. Mr. Nippes did not get a final order for making muskets till October 8, 1840, when Colonel Talcott wrote him that he shall have eight hundred muskets for five years, but says nothing about the price, but leaves it open, and consequently to be settled by Colonel Bomford's letter of 9th March, 1839. It was in January, 1842, before he made his first delivery of two hundred muskets ; in June following he turned in three hundred more, and received for the two deliveries at the rate of $12 50 per musket, being the same price as he had received for the old model. He then went down to Washington to have the price settled, also to have his order for muskets increased, &c."

These are unquestionably the plain facts, and the case of the government may be safely rested upon them. He did come to Washington, and, as I have above stated, asked for the settlement at a certain price, and for an increase of the number. The latter was declined, the former acceded to, and the price asked for by him, $14 50, was agreed to, and fixed on the 16th July, 1842. Indeed, whatever were

the terms of the contract, whether contained in the letters of March 9, 1839, and October 8, 1840, or the unexecuted instrument drawn by Mr. Riddle, they were reduced to a certainty, and fixed by the settlement of July 16, 1842. This settlement recites that there was a "conditional" contract making the price of the muskets contingent, and to be afterwards ascertained, and proceeds to ascertain and fix it. Whether the price was to be *regulated by the cost* at the national armories, as admitted by the Ordnance department, or whether it was to be the exact cost at the armories, (which is really the only difference between the claimant and the department,) the agreement is equally carried out by the settlement of July 16, 1842.

Mr. Nippes, indeed, says that he never acknowledged a final settlement, but took what he could get; but it is utterly inadmissible for him to plead ignorance of the grounds upon which money was paid him, unless he can allege that they were concealed fraudulently, which he does not do.

The impression made upon my mind, upon a review of the whole correspondence, is, that it sustains in the amplest manner the views of the Ordnance department, and it is irreconcilable with the contract set up in favor of Mr. Nippes.

JEFFER. DAVIS,
Secretary of War.

WAR DEPARTMENT, *February* 7, 1854.

Secretary of War to John H. Eaton.

WAR DEPARTMENT,
Washington, February 9, 1854.

SIR: At your request, I have received and fully considered the claim of Mr. Daniel Nippes to be allowed for certain muskets made by him the actual cost of similar muskets made at Springfield armory in lieu of the price already paid him, in support of which claim you seek to set up a contract to that effect, which you say was reduced to writing but not signed by the parties. My conclusions in regard to the matter are as follows:

1. That the evidence entirely fails to establish such a contract. It consists of the testimony of Mr. Riddall, who, writing from memory ten years after the transaction, states that such an instrument was prepared by him while a clerk in the Ordnance office; but he adds that it was not signed because "some conversation was had by Mr. Nippes and the then chief of the Ordnance department upon the subject of an increased number to be manufactured by Mr. Nippes over the eight hundred per annum;" in other words, Mr. Nippes, as he himself states in a paper, without date, marked D, refused to execute it, in the hope of getting a larger contract, as he says "the smaller number, four thousand, would not justify my (his) incurring the expense."

From his own statement, and that of Mr. Riddall, it is obvious that

the alleged contract fails in an essential particular—the agreement of the parties as to the number of guns to be made.

But however strong may be the conviction of Mr. Nippes that such a contract would have been given him if he had been willing to accept it, I am convinced, from an examination of the correspondence between him and the department at that period and subsequently, that he is entirely mistaken on that point. Not only is the correspondence entirely silent as to any such agreement, but the colonel of ordnance frequently expressed strong doubts of his ability to make the muskets. Only a few months after the time when Mr. Nippes says he was offered a contract for four thousand muskets, the Hon. Mr. Fornance solicited in vain for him an absolute order to make only one thousand six hundred muskets, promising that he would not ask the department for any more work. The utmost that he could obtain was permission to make two hundred on trial for inspection, with the right to make eight hundred per annum for five years if those were accepted. Even this the department refused to put in any other form than that of a letter, though strongly urged to enter into a contract to the same effect.

The inference from these facts, which are irreconcilable with the intentions of the department towards Mr. Nippes, as stated by him, is strengthened by the entire absence of any allusion to such a transaction in the correspondence which was actively going on between the parties at that time and continued for some years after.

2. But even if Mr. Nippes could succeed in establishing the contract, which is at once unsupported by the evidence and disproved by contemporaneous records, it would not advance his claim. It is admitted by the Ordnance department that the price of the muskets made by him was conditional, "whether to be regulated by the results of the national armories," as the Ordnance department admits, or to be "the actual cost of manufacturing the muskets at Springfield armory," as you contend, still it was conditional, and open to future settlement. Under these circumstances, Mr. Nippes, on the 14th July, 1842, being in Washington shortly after the delivery and acceptance of the muskets made on trial, wrote to the department, saying it was important that he "should have a certain contract, both as to the number of muskets as well as price," and proposed to make one thousand eight hundred muskets per year for three years, at the price of $14 50 per musket. The department declined to vary the number, but an account was stated in his name, in which it was set forth that the price of the muskets had been left conditional; that it had now been settled at $14 50 per musket; that such allowance should be made in addition to the partial payments already made ($12 50 each) for those delivered as would bring the price up to that sum, and those to be thereafter delivered should be paid for at that price. This being approved by the secretary, Mr. Nippes at once drew the additional allowance, one thousand dollars, for those delivered, and afterwards the price thus agreed on was paid for all the rest as they were completed. Mr. Nippes attempts to get rid of the force of this paper by saying he took what he could get, and never acknowledged a final settlement. But such a plea is entirely inadmissible on his part after having received the full benefit of its pro-

visions, and drawn the advanced price thus fixed; and, in my opinion, this instrument, in connexion with the letter of Mr. Nippes and his acceptance of the money under it, amount to a new constract, fixing and determining whatever was conditional as to price in any former contract, whether that admitted by the Ordnance department or that asserted by you.

I am, therefore, of opinion that the additional evidence produced entirely fails to affect the grounds on which this claim has heretofore been rejected by this department.

Very respectfully, your obedient servant,

JEFFERSON DAVIS,
Secretary of War.

Hon. JNO. H. EATON,
Washington City.

J. H. Eaton to the Secretary of War.

FEBRUARY, 21, 1854.

SIR: I think you have taken a misconceived view of the case of Nippes. If satisfied of this you will doubtless be disposed to do what strict justice and right demand. I will review it in chronological order.

1. Colonel Bomford's letter of March, 1839, is an invitation to Nippes to engage in the manufacture of *this arm*, in which he says, "the price of the new model gun will be regulated by the armories."—(See paper marked No. 1.)

2. Next in order is Colonel Talcott to the Hon. J. Fornance, dated October 8, 1840, where he says, "it is the intention of the department to give Mr. Nippes eight hundred for five years, with liberty to increase the number; and if you feel assured of his skill and ability to execute the work according to the model, (not then prepared,) he may begin at once; but to prevent loss, an inspection of the two hundred, or any less number, at his option, will be made, to ascertain if he will be able to fulfil a contract."—(See paper marked 18.)

3. In his letter of the 20th of October, 1842, Colonel Talcott says: "Taking into view the circumstances connected with your agreement for furnishing this department with four thousand muskets from the 1st of January, 1841, to the 31st of December, 1845, eight hundred muskets per annum, it has been thought proper to waive the question of your failure in delivering the stipulated number of eight hundred per annum from the 1st of January, 1841, and to afford you, therefore, the full benefit of your agreement, you are authorized to deliver," &c.—(See paper No. 14.)

Well might this waiver of the agreement be admitted, since the fault was with the government, for up to the date of Pomeroy's second agreement, (March 17, 1842,) the model pattern gun had not been furnished by the government. The delay hence originated at the Ordnance office, a delay which, with great propriety, might be over-

looked by it. The agreement, whatever it was, by the government, was thus renewed and confined as before, and in pursuance Nippes satisfactorily fulfilled his contract of delivery.

4. Of the capability of Nippes to make the kind of gun required, the intermediate papers on file afford no information until the 14th of July, 1842, the date of Colonel Talcott's letter to the Secretary. He says:

"At his (Nippes's) request he was authorized to make two hundred muskets, which, if approved, he should be allowed to furnish not less than eight hundred a year for five years. This was in the summer of 1840. In January last (1842) he delivered two hundred muskets, and the inspector pronounced them in all respects equal, &c. In January last he delivered three hundred more."—(Paper 12.)

Here, then, is a recognition of the contract, agreement, bargain, either of which mean one and the same thing, and either of which, *in fora conscientiæ*, is binding on the government.

Against all this array of circumstance and fact, the objection taken is, there is no *contract* produced. Literally and technically considered, as far as *writing* and *sealing* is concerned, there is none. But when was it or ought it to be that a just government, against a fair consideration of right, should shield itself under *its bond?* The great object and purpose of the government should be to practice justice, how ever and by what means it may be ascertained.

5. In regard to the additional sixteen hundred guns to be made, and which the Secretary mentions as objection to the claim, that took place in March, 1846, and after that the first contract for the four thousand had been fully complied with. These last were awarded at $14 50. But then there was a marked difference in the matter, for all the expenses of changed machinery, dies, &c., had been encountered, and the gun could then be made at a less price than before.

But apart from these unmistaken facts, there are others which corroborate and confirm all that precedes, and which, taken together, make out a clear case of contract. But were there none others that fail to alter the justice of the demand presented, strict right would require a performance, apart from any additional proof to be adduced.

An agreement or understanding is made by A to build a house for B, and as he quietly proceeds, partial payments are made. On final completion, shall B avoid paying for it on the ground that there is no contract? No court would sustain such defence. What then? A would be bound for a fair estimate of the work; and so with Nippes. If it be objected there is no contract, yet he is entitled to a fair estimate of price; and which price, by the testimony adduced, is the cost of the arm at Springfield armory—a criterion of value which the government itself made and fixed upon. The new model gun was an experiment as to cost. This all the correspondence on file tends to prove. Being favorably considered of, the government was anxious to proceed with the manufacture. To commence it, machinery had to be altered, new dies made, and all the apparatus for working changed by the contractors.

In this dilemma of uncertainty and doubt, the department consented that the cost of the gun should be ascertained at its own armory, and

by that test should be paid for—the test to be made within two years from the 26th of February, 1840, date of Pomeroy's contract, (see paper L,) and such, too, was the pledge to Nippes.

Subsequently, March 17, 1842, Pomeroy, by a second, changed his first contract, fixing his future deliveries at $14 50.—(See paper B.)

But assuredly this could not affect Nippes, who was no party to it. In the papers there is nothing to show that he knew anything of this second altered contract. All he did or could know was that for *his arms*, he was to be paid what Pomeroy received. The informing him that this was only $14 50 was a deception practiced, for Pomeroy, under his contract, and up to the time of its change, as the consideration of yielding his first contract, had assigned to him the making of one thousand additional arms, and also of being paid $16 for the two thousand one hundred guns delivered up to that time. This change of contract by Pomeroy in nowise binds Nippes; he was no party to it.

Concede, though contrary to the proof, as is shown, that Nippes had no agreement, no contract, under what pretence of right and justice should the government avail itself of his artistic skill and labor, and award to him a less rate of compensation than was stipulated for to others for performing identically the same service? Equity revolts at such doctrine.

But there was a contract. Colonel Bomford's letter of March, 1839, (No. 1,) invites him to the undertaking, and says: "The price will be regulated by the armories." The official letters already referred to speak of Nippes's undertaking as a contract, agreement, &c. Confirmatory of which is the affidavit of Nippes, (paper C 1,) than whom there is no man more veritable, and he asserts there was a contract drawn up, by which he was to receive the same price contracted for by Pomeroy. Such being the assurance had at the time, that assurance ought to be fulfilled.

Mr. Riddall, also a gentleman of unquestioned verity, says that, by direction of the Ordnance office, he did draw up a contract, and that one of its stipulations was, that Nippes was to receive the price agreed to be paid Pomeroy under his contract, which was the cost of the gun at Springfield.—(See paper C.)

The facts and circumstances considered, there is no room to resist the conclusions to which they lead: first, that they clearly establish a contract; and second, if they do not, the work being faithfully and well done, Nippes should receive the price agreed to others, under the agreement of the department.

But if, reasonably, anything of doubt can be entertained, then, by the established rules of construction and right, the inclination of that doubt ought to be in favor of the *weaker* party. Be this not so, and the humble citizen must remain a pigmy in a giant's grasp. Send him for relief to Congress? Better to consign him to the spirit rappers, for it is only through them he could ever hear of it again.

In the present case the only question is the *amount that ought to be paid*. At $14 50 *Nippes is not paid*, for the whole proof shows he was to receive the cost of making it at the armory, (over $17,) an amount which in justice he should be paid. Between what he has received and what rightly he is entitled to for his performed labor, expense, and

service, is too inconsiderable to authorize a doubt to be thrown around public faith and justice. A nation's honor is the inviolable maintenance of its engagements.

Respectfully,

JNO. H. EATON, *Attorney.*

The SECRETARY OF WAR.

The Secretary of War to J. H. Eaton.

WAR DEPARTMENT,
Washington, March 4, 1854.

I have received and considered your letter of the 21st ultimo, respecting my decisions in the Nippes claim.

There are errors in your statement which it is unnecessary to point out, and I will only assure you that every circumstance brought forward by you in this and former communications was fully considered before my decision was made.

Very respectfully, your obedient servant,

JEFFERSON DAVIS,
Secretary of War.

Gen. JNO. H. EATON,
Washington City.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Brief of the claimant.

This claim is founded upon an agreement, express or implied, between the government of the United States (through the Ordnance department) and the claimant, for the manufacture and delivery of four thousand muskets called "new model muskets."

The proof of the express agreement, and the precise nature of the agreement itself, is to be found in the letters issuing from the Ordnance department, and papers and documents prepared by its authority, and now presented to this court.

1. The first letter, and the one initiatory of the agreement, was that of George Bomford, colonel of ordnance, March 9, 1839.—(Page 12 of the record.) No period is mentioned in which the examination and acceptance mentioned in said letter is to be made. A reasonable period, therefore, after the commencement of the manufacture at Springfield armory, is to be presumed.

2. This commencement took place early in 1840.—(See extract from Pub. Doc., No. 1, on page 44 of this record; also extract No. 3, page 45.) Besides, it appears from said letter of Colonel Bomford that Mr. Nippes was continued in the manufacture of the *old musket* during the year 1839.

2. Mr. Nippes accepted the proposition in said letter to go to Springfield armory and make the examination, and went.—(See Bates's dep., interr. 16th, page 66.)

3. That this was in the spring of 1840 is shown from the fact that as early as May, 1840, he was making every effort to get possession of the "new model" pattern, which had been repeatedly promised him.—(See his letter May 14, 1840, p. 15; letter to Mr. Fornance from Secretary of War, p. 16; from Fornance to Nippes, p. 16; Fornance to Secretary of War, p. 19; Talcott to Fornance, August 1, 1840, p. 19, in which it is said "the order for a new model has been reiterated." See the several letters, printed on pp. 20 and 21, signed, respectively, Fornance, Symington, and Edward Lucas, jr.)

4. The new model pattern was finally sent and received about the 15th of September, 1840.—(See Lucas's letter, p. 21; and Fornance's letter, p. 23.)

5. The sending of the new model, and the great pains taken to get it ready, is proof that Nippes had accepted the proposition of the Ordnance department contained in Bomford's letter aforesaid, to wit: that in case he decided to go into the manufacture of the "new model musket" upon terms acceptable to the Ordnance department, he was to receive a "new model musket" as a pattern. The testimony is, that a "new model musket" was sent to him at great pains. The conclusion is, that he had agreed to go to work on the new pattern upon terms acceptable to the Ordnance department.

That Mr. Nippes had given his acceptance is proved by his extensive and expensive preparations long before he received the pattern musket.—(See Abraham Nippes's test., interr. 7 and 8, p. 58; and Wm. Miles's test., interr. 5, p. 55.)

The terms acceptable to the government were, that "the price to be paid for the new arm should be regulated by the results of the national armories." The acceptance of the model musket by Mr. Nippes was the acceptance of these terms.

That these were the terms acceptable to the government is further proved by the contract entered into as early as February, 1840, with Mr. Pomeroy.—(See said contract, p. 13, particularly the fourth article thereof.)

6. The aforesaid letter of Colonel Bomford is repeatedly recognized by his successor, Talcott, as a part of the contract with Nippes.—(See the letter of July 15, 1842, p. 27; also December 11, 1840, Talcott to Fornance, p. 25, in which Mr. Nippes is given to understand that he "may safely rely on all the letters from this [the Ordnance] office." See also the letter of the colonel of ordnance to Nippes, October 20, 1842, p. 30, in which he speaks of Mr. Nippes's "agreement for furnishing this department with muskets from the first of January, 1841, to 31st of December, 1845, at eight hundred muskets per annum." Also extracts from Public Documents, p. 50.)

7. The Ordnance departmental ways considered itself bound by the letter of Colonel Bomford. Hence, Mr. Nippes always received assurances that he would be allowed to manufacture a portion of the new public arms, and extraordinary pains were taken to furnish him with a perfect pattern.

8. The contract was complete in every respect, except as to the *number* of the arms to be made by him, and the *time* to be allowed him for their completion and delivery.

9. If in this state of things Mr. Nippes had manufactured any number of model muskets, their acceptance by the government would have given the right to demand payment according to the terms of the agreement. These terms were (as to price) what the results of the public armories would determine to be the worth of the musket.

10. If the government could not or would not ascertain those results in a reasonable time, then would it be bound to pay the claimant for his work, labor, and materials as much as they were reasonably worth.

11. The *hiatus* in the agreement, so far as regards the *number* of muskets, was partly filled up on the first of August, 1840. Mr. Talcott then writes to Hon. J. Fornance, (p. 19,) that the order for the "model musket" had that day been *reiterated;* and as to "the *number* of muskets to be made by Mr. Nippes, it has not been settled further than to assure him that he should be allowed eight hundred."

12. Whether it was the meaning of the Ordnance department that Mr. Nippes should be allowed only eight hundred altogether or eight hundred per annum, or whether Mr. Talcott mentally reserved the right to interpret the offer either way, does not exactly appear.

If the former, then the agreement was incomplete, because the time within which the eight hundred muskets were to be completed was uncertain. If eight hundred muskets per annum was intended, then the contract was complete in all respects.

To settle this doubt—to render the contract perfect and complete—Mr. Talcott writes to Mr. Fornance, on October 8, 1859, as follows: "Your letter of the 6th instant has been received. It has been the intention of the department to give Mr. Nippes a contract for eight hundred muskets a year for five years, with liberty for the government to increase the number on giving suitable notice, &c. If you feel assured of his skill and ability to execute the work according to the model, he may begin at once," &c. That is, begin to complete the four thousand. He had long since begun his preparations, at great expense, for working on the new model musket.

13. This promise, and its acceptance by Nippes, (shown by his proceeding to work under it,) made the agreement between the parties complete.

14. This contract, although made up of several detached parts, like the model musket, is nevertheless a perfect contract, and was so considered by the government.—(See letter of Fornance to Talcott, December 9, 1840, p. 24, in which he asks for a written contract, to contain all that the letter of Talcott contained; and the reply of Talcott, p. 25, in which he virtually acknowledges the letters from the Ordnance department to be equivalent to an agreement, saying "there is no hazard or difficulty in the case. Mr. Nippes may safely rely on the letters from this office.")

15. The contract was nevertheless conditional in regard to the price ultimately to be paid. This did not make the contract any the less perfect.

The price was conditional—dependent upon the price at the national armories.

This is shown by the letter aforesaid of Colonel Bomford, (p. 12;) reiterated in the letter of Talcott to W. B. Lewis, July 16, 1842, (p. 29.) In the latter reference is made to the former letter, and an intimation is clearly made, that, in accordance therewith, an assignment was made to Mr. Nippes on the 8th October, 1840, for the manufacture of eight hundred muskets per annum for five years, at the *conditional price* of $12 75 per musket.

16. What is here meant by conditional price? The reference to Bomford's letter clearly shows that it means that the price was so to remain until the real price could be ascertained at the national armories.

This letter of Talcott (p. 29) states $12 75 as the conditional price. His letter to Mr. Marcy (p. 36) gives the price at 12 50. The statement of deliveries (on p. 37) shows the discrepancy to consist in the allowance of twenty-five cents for appendages, $12 50 being the allowance for the musket.

The statement, therefore, in the letter of Secretary Marcy to Mr. Yost, (p. 38,) in which he says that "the price of the muskets furnished by Mr. Nippes was not conditional," and which statement he founds on the letter of Talcott to Lewis, (p. 29,) and the statement of deliveries, (p. 37,) is a mistake.

The letter of the Secretary of War to Eaton (p. 99, No. 2) admits that the price of the muskets to be made by Nippes was conditional.

17. This view of the contract between the parties is fully sustained by the written agreement between the Ordnance department and Pomeroy, (p. 13.) The principle of the two agreements is the same. Also by the agreement between the United States and Mr. Nippes, drawn under the direction of the Ordnance department, although not signed, dated in the autumn of 1841.—(See the whole testimony of William C. Reddall with regard to this agreement, p. 77.) It was intended by both parties as the agreement between them.

18. So far as the four thousand model muskets were concerned, this was the contract between the parties. The signing was only postponed by mutual consent until more muskets should be added.

19. The contract, so far as it reached, (that is, the four thousand muskets,) was agreed to, was entire, and was retained by the government.

We prove the substance of that contract by the witness who, at the request of the Ordnance department, drew it up.

Whether as a subsisting agreement between the parties, or as evidence of an agreement already subsisting, the draught referred to by Mr. Reddall conclusively establishes the *aggregatio mentium* of the parties.

20. Mr. Nippes long ere this, under the agreement founded on "the letters from the Ordnance office," had begun and continued "faithfully to comply with what pertained to his share of the business;" and he so continued after the said written contract was entered into. His duties under the first and second agreements were substantially the same.

21. In January, 1842, he delivered two hundred muskets; in June, 1842, he delivered three hundred muskets; for each of which, at the time of delivery, he received the "*conditional* price of $12 50 per musket, and twenty-five cents for appendages."—(See schedule, p. 37.)

22. The quality of these arms appears to have been of the highest order.—(See letter of Talcott to Secretary of War, p. 28, in which he says "the inspectors pronounced them equal in all respects to those made at any other place.")

23. Four months had passed away since the termination of the period fixed upon by the government for determining the price of the musket according to the results of the national armories.—(See fourth article of Pomeroy's first contract, p. 13; sworn to in Reddall's testimony as a part of the agreement with Nippes, p. 78, 11th interr.)

Mr. Nippes had been at immense expense in preparing for the manufacture of and in manufacturing the musket.

This ascertainment of price could only be made property by the government.

24. Whether made within the time specified or made and the knowledge thereof withheld, there was a failure on the part of the government to comply with its contract.

The government knew the price of the musket to be much more than $14 50. They knew the actual cost thereof at the Springfield armory to be at least $17 per musket.—(See second agreement with Pomeroy, p. 25, B. See p. 45, extracts from Pub. Doc., No. 7, sess. 1841–2.) And they knew, what is obvious to every one, that Mr. Nippes could not manufacture the model musket at less cost to him.

25. Their duty, independent of positive contract, was to allow to Mr. Nippes that actual cost and a reasonable profit. Instead thereof, the Ordnance department, against the will of Mr. Nippes, without his consent, and, it would seem, without his knowledge, arbitrarily, illegally, and unjustly "*established*" and forced upon him a price far below the actual cost—the ruinous price of $14 50 per musket, and twenty-five cents for appendages.

26. It is absurd to call this arbitrary establishment of price a contract between Mr. Nippes and the government, as is actually done by Secretary Marcy.—(Page 38, letter to Yost.) There is no evidence that Mr. Nippes even acquiesced in it. He only submitted to superior power. It was $14 50 or nothing.

This idea of the Secretary was probably induced by a letter from Daniel Nippes to him of July 14, 1842.—(Page 27.) As an inference, it was and is entirely false.

27. It is clearly established by the reason of the thing, and by testimony, that $14 50 per musket for eighteen hundred muskets per year for three years is equivalent to $18 per musket for eight hundred per year deliverable in five years.—(See Elizur Bates's test., 26th interr., p. 68; and interr. 20th, p. 67; also the arithmetical rule stated in the petition, pp. 6 and 7.)

On the other hand, we say that the aforesaid letter of July 14, 1842, (p. 27.) was contrived or used as a cunning device by Talcott for the purpose of imposing on Nippes, *apparently* with his own

consent, the arbitrary and unconscionable price of $14 50 per musket.

The whole documentary evidence is fraught with proof of oppressive and unjust treatment on the part of Col. Talcott towards Mr. Nippes, who appears to have taken a dislike to Nippes, founded, perhaps, on his letter of May 14, 1840, to Fornance, p. 15.—(See that letter and the correspondence ensuing as far as p. 25, inclusive; also the partial contract with Pomeroy, p. 25, B; and the refusal to grant the reasonable request contained in the above letter of Mr. Nippes, July 14, 1842, p. 27.)

Whatever privileges Talcott did appear to accord to Nippes, he accorded reluctantly, and was coerced to it by the powerful outside pressure of members of Congress of high political influence.

The offer to manufacture eighteen hundred muskets a year for $14 50 was made after long delay in the government to do justice to Mr. Nippes. It was made on the 14th July, 1842. It was rejected in consequence of the letter of Colonel Talcott on the 15th. On the very next day, the 16th, Colonel Talcott, seizing hold of the letter of Nippes with avidity as a pretext, arbitrarily "established the offer of $14 50 therein contained as the price of the eight hundred muskets per annum." At the same time, he concealed the fact of a better bargain made with L. Pomeroy made only four months previously.

28. The proposition of Nippes, made March 3, 1846, (see p. 33,) to furnish sixteen hundred additional muskets in two years, at $14 50 each, is afterwards used by Talcott as an additional argument against the claim of Nippes, but with great weakness. The proposition was made after the machinery of Nippes was in full operation, and it gave him the privilege of delivering, at any time within two years, the sixteen hundred muskets, and did not restrain him to eight hundred per year.—(See statement of deliveries, p. 37.)

PROPOSITION OF LAW.

There was either an *express* or an *implied* contract in this case.

If express, an essential ingredient of it was, "that the price of the musket should be regulated by the results of the national armories," or (more particularly) of the Springfield armory.

An "*approximation*" to those results we ascertain by the second contract with Pomeroy, (p. 25, B,) and we show it to be $16 per musket.

A much nearer approximation we show by extracts from the public documents, to be found between pages 44 and 50 of this record, averaging $19 50.

We further show the results of the Springfield armory by the testimony of Elizur Bates. But before extracting his evidence, I beg leave to advert to the testimony of the Rev. John Robb, a citizen of high standing and chief clerk of the Pension office, in regard to the skill, capacity, and general character of Elizur Bates.—(Top of p. 83.) He says that "he (Mr. Robb) was superintendent of the Springfield armory from November 1, 1833, to the middle of April, 1837. Mr. Bates was master armorer under him from January, 1834, to the spring

or summer of 1837, when he voluntarily resigned that position. He was subsequently, however, employed in the armory in a different capacity. Mr. Robb considered him an excellent workman and a first-rate master armorer as to skill and ability; and such was Mr. Robb's opinion of his truth, faithfulness, and integrity, that he would compare favorably with any other man within his knowledge. He was a man of strict integrity and a high sense of honor."

In a letter on file with the documents, dated September 4, 1847, (p. 39,) Mr. Bates gives the cost of the model musket for five years—from 1841 to 1845—$16 84, or $16 85 .6. In this he does not include the superintendant's pay and the interest on the capital invested; nor perhaps other officers' salaries; nor interest on the entire capital employed; nor insurance against all risk; nor any percentage for wear and decay; which would bring it up to the above average of $19 50. Again, in answer to interrogatory 10th of his deposition, (p. 65,) in which he is asked "what, during the first year of the manufacture of the 'new model musket' at the Springfield armory, was the cost of each musket, regarding in his estimates, as the elements of cost, only stock, materials, labor, and officers' salaries," he says: "Not less than $17 75, or not to exceed $18 50." The inclusion of the other elements of cost would make the entire amount $19 50.

2d. If the existence of an express contract has not been proved, can there be a doubt of the existence of an implied contract? Daniel Nippes undertook to manufacture four thousand muskets of the "new model," deliverable in five years; that is, eight hundred a year, beginning for the first delivery on the 1st of January, 1841. Owing to the great difficulty in preparing his machinery, and the delay occasioned by his not receiving in a reasonable time the pattern musket, it was more than one year before Mr. Nippes was ready to commence his work. At his request the Ordnance department consented to allow him to deliver more than eight hundred muskets per year, provided the number should not exceed one thousand per year, limiting the final delivery to the year 1845.—(See letter of Nippes to colonel of ordnance, p. 29; and the reply of Colonel Talcott, p. 30.)

This undertaking on the part of Nippes was complied with to the satisfaction of the Ordnance department.

The excellent quality of the work done is admitted by the Ordnance department.—(See Talcott's letters, pp. 28 and 34.)

The law, therefore, gives to him for his work and labor done its full value.

The only remaining question, therefore, is what is that value?

It should consist of the actual cost of the work, labor, and materials, and a reasonable profit on the work.

In estimating the first, we can again refer to the cost of a similar work at the national armories. By the testimony of Bates, (interr. 18th, p. 66,) it is shown that the cost of the "new model musket" at a private manufactory of arms would be about the same as the cost at the Springfield armory; and he has no doubt of it, "provided the private contractor have the privilege of making the same number of guns monthly or annually that are manufactured at the Springfield armory in the same period. But to make one-twentieth, or even one-

tenth of the number, in a private manufactory, the cost would be considerably more in proportion to the private contractor."

It was this consideration and others that induced Mr. Bates, in his deposition, to estimate the cost of the musket to Mr. Nippes at $19 50, exclusive of a reasonable profit.—(See interr. 24th, p. 68)

This is precisely the amount affixed by Mr. Nippes to his bill made out January 14, 1857.—(p. 87.)

Mr. Nippes and his son, on the same day, make oath that the actual cost to him of each of the said four thousand muskets was not less than $17 per musket, and that such allowance would be without any profit.

This restriction to $17 is made by him because, as he clearly shows in the same affidavit, he was under the full belief that he could not claim more than the actual cost of the musket at the Springfield armory, "and that he is informed" that $17 was such actual cost at the said armory.—(See affidavits of Nippes and son, pp. 85 and 86.)

Mr. Nippes had, previous to 1840, manufactured muskets by hand. It was peremptorily required by the Ordnance department that the "new model" should be manufactured by *machinery*, and that of a new and unusual kind.—(See the letter of Talcott to Secretary of War, June 9, 1840, p. 17.)

Also new tools were to be manufactured and new parts of the musket to be fabricated. This involved Mr. Nippes in great expense, all of which ought to be considered in his estimate of costs. The character of this expense is shown in the deposition of Miles Keely, (6th, 7th, 8th, and 11th interr., p. 52,) and deposition of William Miles, (interr. 4th, 5th, 6th, 7th, pp. 55, 56;) also Mr. Abraham Nippes's deposition, (interr. 9, pp. 58, 59.) In this statement witness estimates the average cost of the model musket for 1842 at $22 to $23 a piece, and for the four following years at from $18 to $20 a piece.

But Mr. Nippes was also entitled to a reasonable profit on each musket. In estimating this profit, the witnesses vary from three dollars up to five or six dollars.

Mr. Robb (interr. 9th, p. 84) says: That if he "had the necessary buildings, machinery, and tools," he would not manufacture "eight hundred (muskets) a year for less than three dollars profit."

Mr. Ab. Nippes (interr. 14th, p. 60) says: That "claimant received a profit of 'say three dollars a piece' on the old model musket;" but (in interr. 11th, p. 60) he says that "on 'the new model' the profit should have been from four to four and a half dollars a piece."

Mr. Lehman (interr. 17, p. 74) says: "That Mr. Nippes ought to have received a profit of five dollars per musket on those manufactured by him in 1841, 1842, 1843, 1844, and 1845."

Mr. Bates (interr. 25, p. 68) says: "That from five to six dollars per musket would be a reasonable profit."

The claimant in this case has not claimed more than $19 50 per musket. In one aspect of the case, he has, in his petition, put his claim at a minimum of $18 50. Under the considerations mentioned in his brief, he extends this last claim to $19 50, which he considers below what has been actually proven as the actual value per musket of the model musket manufacturer and delivered by him.

JOHN S. TYSON,
Solicitor for Claimant.

IN THE COURT OF CLAIMS.

DANIEL NIPPES *vs.* THE UNITED STATES.

Solicitor's Brief.

MATERIAL AVERMENTS IN PLAINTIFF'S PETITION.

1. That he had a contract with the War Department to furnish a certain description of muskets called the "new model" musket, to the amount of 4,000.

2. That he was to be paid the price that it cost the United States to make such muskets at Springfield, Massachusetts.

3. That it cost the government to make such muskets at Springfield each $18 50.

4. That the United States paid him only $14 50 for those made and delivered by him, with twenty-five cents added for "appendages."

5. That he ought to receive $19 50 for each musket, and he thinks it cost him that sum.

There are various other matters stated in the petition, none of which are, however, deemed material as to the questions really involved in the case as presented by the record.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

1. That the Ordnance office of the War Department agreed with the plaintiff to take 800 muskets of the new model, for each year for five years, at the price of $12 50, with the condition that the plaintiff should be allowed what it cost to manufacture them at Springfield, when satisfactorily ascertained.

Mr. Fornance, in behalf of Nippes, wrote the Ordnance bureau on the 6th of October, 1840, in relation to making a contract, and received a reply in these words:

ORDNANCE OFFICE,
Washington, October 8, 1840.

SIR: Your letter of the 6th instant has been received. It has been the intention of the department to give Mr. Nippes a contract for 800 muskets a year for five years, with liberty for the government to increase the number on giving suitable notice. The only difficulty has been to save Mr. Nippes from loss, and the United States from disappointment, by the rejection of his work in case it does not come up to the required standard. If you feel assured of his skill and ability to execute the work according to the model, he may begin at once; but to prevent a great loss, an inspection will be made as soon as he has 200, or any less number, at his option, ready for examination; or one of the master armorers of the United States may be ordered to make an inspection of the machinery and tools of Mr. Nippes at once, and report whether he will be able to fulfil a contract.

Respectfully, &c., &c.,

G. TALCOTT,
Lieutenant Colonel of Ordnance.

Hon. J. FORNANCE,
Norristown, Pennsylvania.—(R., p. 24.)

On the 9th of December, 1840, Mr. Fornance wrote that plaintiff, owing to the elections which had defeated Mr. Van Buren and elected General Harrison, felt somewhat uneasy, and wished a conditional contract, and he thereupon received the following reply:

ORDNANCE OFFICE,
Washington, December 11, 1840.

SIR: Your letter of the 9th instant, in relation to the affairs of Mr. Nippes, has been received. There is no hazard or difficulty in the case. Mr. Nippes may safely rely on the letters from this office, and if he complies with what pertains to his share of the business, he may depend on having a contract.

It is not usual to make conditional agreements in any other way than that which has been followed in his case, and you may assure him of its security in any event that can possibly occur.

Respectfully, your obedient servant,
G. TALCOTT,
Lieutenant Colonel of Ordnance.

Hon. J. FORNANCE,
House of Representatives.—(R., p. 25.)

In consequence of this letter, the plaintiff went to work to make the muskets.

Although the subject of a special contract and price was afterwards considered, no price was specially agreed upon until 1842, when a settlement was made as to the past and a basis for the future agreed upon, as follows:

Colonel Talcott states that "inducements were held out to him for the manufacture of the new pattern musket, of which an assignment was made to him on the 8th of October, 1840, for the manufacture of 800 per annum for five years, at the conditional price of $12 75 each."—(R., p. 29.)

Colonel Talcott reports this in substance at page 34 of the record.

The condition referred to was, to pay what it should actually cost to manufacture at Springfield, when satisfactorily ascertained.

2. That said muskets were delivered.

The delivery of the 4,000 muskets has been conceded on various occasions and in different manners, and has at no time been the subject of dispute or question. The plaintiff states the number in his account at page 87 of the record. Others were delivered under the supplemental contract.

3. That the department intended to pay what it cost to manufacture such muskets at the armory at Springfield, but that this could not be ascertained with requisite certainty, and therefore a price was agreed upon in 1842, and accepted by the plaintiff.

Colonel Talcott, on the 13th of February, 1847, states the facts in relation to this point, after stating that Pomeroy had a written contract for $12 50 per musket, for certain, and whatever it should actually cost to make and manufacture them at Springfield, as follows:

"Owing to the adoption of a musket of a new model, and the consequent change of machinery, it was found impossible to ascertain their cost within the specified time; and, to settle the question, a supplementary contract was made with Mr. Pomeroy, dated March 17, 1842, by which he was allowed at the rate of $16 per musket for the two thousand one hundred muskets delivered up to that time, and $14 50 per musket for those he was yet to furnish.

"Mr. Nippes's deliveries were made under an order given him in October, 1840, for eight hundred muskets a year for five years, at the price of $12 50 per musket. When he had delivered the first five hundred muskets, he complained that this price was too low. His case was then examined, and he was, in July, 1842, allowed at the rate of $14 50 per musket, (the same price paid Pomeroy by the supplementary contract,) both for the muskets then delivered and for those remaining due under his order. The whole amount of his deliveries prior to the date of Pomeroy's supplementary contract was two hundred muskets; and even if their cases are made to agree exactly, as he claims they should, it would give him only the additional $1 50 on these two hundred muskets. But it is proper to remark that Mr. Nippes has already, in consideration of this very point, been allowed an *extension* of his order to the amount of sixteen hundred muskets, and of two years' time to deliver them in. I do not, therefore, think that Mr. Nippes has any claim for an additional price for any muskets he has delivered.

"Mr. Yost's letter, with its enclosure, is returned herewith.

"I am, sir, respectfully, your obedient servant,

"G. TALCOTT,
Lieutenant Colonel of Ordnance.

"Hon. W. L. MARCY,
"*Secretary of War.*"—(R., p. 36.)

4. That after a portion of the arms were delivered it was finally agreed to pay the plaintiff $14 50 for each of said muskets, and 25 cents for the appendages for each.

When it was rendered certain that the department could not ascertain the exact cost of manufacturing the new model musket at Springfield, it fixed a price, which it believed to be fair and just, and which formed a part of the new written contract entered into with Pomeroy. This price was proposed to the plaintiff and accepted, and his account was made out upon that basis and allowed and paid. The chief of the Ordnance bureau wrote the following letter to the accounting bureau, which was approved by the Secretary of War:

ORDNANCE OFFICE,
Washington, June 16, 1852.

An account for the foregoing allowance of one thousand dollars was sent to the treasury, July 16, 1839, with the following explanations:

On the 9th of March, 1839, an assignment was made to Mr. D. Nippes of one thousand muskets at $12 25, which he has delivered. In the same letter inducements were held out to him for the manufacture of the new pattern musket, of which an assignment was made to

him on the 8th of October, 1840, for the manufacture of eight hundred muskets per annum for five years, at the conditional price of $12 75 each. In the process of their manufacture it was found that $12 75 was not an adequate compensation, and it has now been established at $14 75, viz: $14 50 for the musket and 25 cents for the appendages, at which price the five hundred already delivered, and those hereafter to be delivered, are to be paid for: and it is accordingly requested that the sum of one thousand dollars, being the amount of the annexed account, may be paid to Mr. D. Nippes out of the appropriation for "arming and equipping the militia."

G. TALCOTT,
Lieutenant Colonel of Ordnance.

WM. B. LEWIS, Esq.,
Second Auditor.

ORDNANCE OFFICE, *July* 16, 1842.

Respectfully submitted to the Secretary of War for his approval.

G. TALCOTT,
Lieutenant Colonel, Ordnance Department.

Approved July 16, 1842.

J. C. SPENCER,
Secretary of War.

(R., pp. 37, 38.)

The statement referred to will also be found at page 29 of the record.

The following is a statement made by Governor Marcy in 1847:

WAR DEPARTMENT, *February* 18, 1847.

SIR: I have the honor to enclose herewith a report from the Ordnance bureau of this department upon the claim of Mr. D. Nippes, presented in his letter of the 11th instant, and transmitted in yours of the same date.

It appears from this report that the price of the muskets furnished by Mr. Nippes was fixed by contract—not left conditional, as in the agreement with Mr. Pomeroy, to which he refers as a precedent in his favor—and full payment has been made to him according to the terms of that contract.

Very respectfully, your obedient servant,

W. L. MARCY,
Secretary of War.

Hon. J. S. YOST,
House of Representatives.—(R. p. 38)

The plaintiff concedes in his petition, as well as in his letter, that he has been paid according to the rates stated in the last above letter from Colonel Talcott.

5. That the plaintiff was settled with and paid at the rate of $14 50 for all the muskets of the new model manufactured and delivered by him, and that he accepted said payment, without objecting thereto at the time, as his proper compensation therefor.

It is shown above that the plaintiff was settled with and paid at

the rate of $14 50 for the muskets delivered, and twenty-five cents for appendages.

There is no evidence that the plaintiff at that time complained of this price, or objected to receiving the same; but, on the contrary, he went on and constructed 3,500 others at that same price. This is conclusive upon him.

The fact that the plaintiff wished, in 1846, to extend or renew his contract, proves clearly that he was not dissatisfied, even at that time, with the price. He got Mr. Yost, a member of Congress, to write to the War Department on the subject of renewal or extension.—(Mr. Yost's letter, R., p. 32.)

The Ordnance bureau at first thought they had muskets enough of that kind, and that if a new contract was made it would be necessary to advertise.—(R., p. 32.)

This advertising became necessary under an act of Congress passed about that time.

The plaintiff's reply (R., p. 33) takes the ground that his contract ought to be extended, and states the reasons therefor. He claimed it as a right or a favor to have an additional quantity to manufacture upon the terms under which he was then working. This was two years after the price of $14 50 was agreed upon, and he was then receiving it. The following is the letter referred to:

WASHINGTON CITY, *February* 27, 1846.

SIR: When I took a contract for making muskets several years since, it was for the small number of 4,000, being 800 a year. The change in the model from which I had formerly worked subjected me to provide a quantity of expensive machinery, which has not only taken all my profits but a great deal more, so that I am much worse off now than when I began. I thought that the United States would always make muskets to arm the militia. *I supposed that when my contract was fulfilled I should get another, provided I made good arms and gave satisfaction, which I believe I have done.* I am met now by a refusal to renew my contract, and it seems to me a hard case, that when I have done well, I should be left to bear all the expenses without remedy; for then my expenses were gone into so that the work might be of the very best kind.

I have understood that Mr. Pomeroy had an *allowance* for his great expenses, *by increasing the number of arms to be made by him over and above what his contract called for.*

If this is so, I hope the same favor will be allowed to me, more especially because my contract was for so small a number; for it takes about as much machinery to make a few arms as a great many.

Trusting to your sense of justice in this matter, I remain, respectfully, your obedient servant,

DANIEL NIPPES.

Hon. WM. L. MARCY,
Secretary of War.—(R., p. 33.)

The favor then asked was granted as follows:

ORDNACE OFFICE,
Washington, March 3, 1846.

SIR: Referring to your letter to the Secretary of War of 27th ultimo, I have now to inform you that the recommendation of this office to extend your order for muskets, to the extent of two years' delivery, has been approved.

You are therefore authorized to furnish sixteen hundred muskets, in addition to the four thousand ordered of you in October, 1840, and for which you will be paid at the rate of $14 50 each.

I am, sir, respectfully, your obedient servant,

G. TALCOTT,
Lieutenant Colonel of Ordnance

DANIEL NIPPES,
Millcreek, Pennsylvania.—(R., p. 33.)

Under this arrangement plaintiff went on and and manufatured and delivered the 1,600 additional muskets, and received his pay therefor, as he has frequently admitted, as appears by the record.

There is no evidence that he ever claimed a greater price than was allowed him until after he learned, through the report of the Secretary of War, that Pomeroy had been paid, for a portion of the muskets delivered by him an addition of $1 50 per musket. He then expressed the opinion he ought to be allowed the same price, although he had no written contract.—(Pl'ffs title, R., p. 35.) But, nevertheless, within sixteen days after that, he asked for the extension of his contract, and four days after applying he obtained the extension to the amount of 1,600 muskets.

7. That at the time of fixing the price at $14 50 per musket, only 500 had been delivered, and consequently, if the plaintiff were to be allowed an additional price, it could only extend to these five hundred.

It clearly appears that only 500 muskets were delivered.

Col. Talcott states, "In October 1840, Mr. Nippes was given an order for eight hundred muskets a year for five years, at the like conditional price of $12 50 each. After he had delivered five hundred muskets under this order, he complained that he could not make them for that price, and upon a review of the case, he was, on the 16th of July, 1842, allowed $2 each on the five hundred delivered, and $14 50 for those to be delivered."—(R., p. 34.)

If this statement is true, (and it cannot be doubted,) the price for all to be delivered in future was distinctly fixed, so that the claim, upon the grounds assumed by the plaintiff, could only be on the 500 previously delivered.

But Col. Talcott also shows that, as to the muskets previously delivered, the conditional price of $12 50 was changed into a definite and positive price of $14 50 for each. This was to apply to the whole 4,000, and was afterwards applied to the 1,600 subsequently agreed for. This adjustment of the price is conclusive upon both parties.

If it were not so, and the original Pomeroy agreement were to prevail, it has not yet been "satisfactorily ascertained by the United States"

what it actually cost to manufacture such arms at Springfield, nor can it be possibly ascertained.

It is believed that these are all the material facts in this case. The solicitor is aware that there is a vast body of facts found in the record other than the above, but he thinks they have no bearing whatever upon the material questions in the case, and for this reason they are not referred to as being among the material facts found in the record.

6. There was no written agreement.

This is distinctly denied by the United States, and there is no evidence that one was made. A contract was drawn out and never was executed by either party, and therefore was not a contract in any legal sense of that word.

This is clearly shown by plaintiff's own statement, marked "D," at pages 40 and 41 of the record.

He went to work, not under written contract, but under Col. Talcott's letter to Fornance, dated on the 8th October, 1840. This is clearly shown by Fornance's letter to Col. Talcott, dated 9th of December, 1840.—(R., p. 24, 25.)

On the 11th of the same month Col. Talcott says, plaintiff may rely upon letters from his office-—(R., p. 25.)

This case does not present any important legal questions. It seems to depend entirely upon questions of fact, and upon them it must be determined.

R. H. GILLET, *Solicitor.*

DECEMBER 15, 1859.

IN THE COURT OF CLAIMS.

APRIL 16, A. D. 1860.

DANIEL NIPPES *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the court.

In the year 1839 the petitioner was engaged in furnishing muskets to the United States. On the 9th day of March, A. D. 1839, he was informed by George Bomford, colonel of ordnance, that after the expiration of that year no order would be given him for muskets of the model then in use; that an opportunity would be given him at the Springfield armory to examine the new model musket and obtain the necessary information to enable him to determine whether he would engage in the manufacture of arms on that model; that in case he decided to do so on terms acceptable to that department, he would be allowed the use of a musket to enable him to prepare the necessary tools, as soon as he might desire it; and that the price of the new model would be regulated by the results of the national armories, and would probably not be less than fifteen dollars for the first year.

The petitioner alleges that he accepted this offer; but on the 9th of June, A. D. 1840, Col. Talcott stated that no contract had been made by him with the United States for muskets of the new pattern. (Letter of Col. Talcott to the Secretary of War of June 9th, A. D. 1840.) But

prior to the 1st day of August, A. D. 1840, he was assured by the Ordnance office that he would be allowed to furnish eight hundred muskets of the new model, and on that day an order, which had been previously given by that office to the superintendent of the Harper's Ferry armory to send him a model musket, was reiterated. (Letter of Col. Talcott to Mr. Fornance of August 1st, A. D. 1840.)

On the 8th day of October, A. D. 1840, Col. Talcott stated to Mr. Fornance that it had been the intention of the department to give the petitioner a contract for *eight hundred* muskets a year for five years, with liberty to the government to increase the number on giving suitable notice; and that if he felt assured of the petitioner's skill and ability to execute the work according to the model, the petitioner might begin at once. (Letter of Col. Talcott to Mr. Fornance of October 8th, A. D. 1840.)

On the 11th December, A. D. 1840, Col. Talcott assured the petitioner that he might safely rely on the letters of the Ordnance office, and that if he complied with what pertained to his share of the business, he might depend on having a contract. (Letter of Col. Talcott to Mr. Fornance of December 11th, A. D. 1840.)

On the 14th day of July, A. D. 1842, the petitioner, in a letter to the Secretary of War of that date, stated that he had previously delivered *five hundred* muskets of the new model, and proposed that, as it was important to him to have a certain contract, both as to number of muskets and as to price, a specific order should be given him to make *eighteen hundred* a year for three years, to commence from the 1st of January, A. D. 1843, at the price of $14 50 a musket; but an extension of the number of muskets to be furnished by him was then refused. (Report of Col. Talcott to Secretary of War of July 15th, A. D. 1842.)

An account in favor of the petitioner against the United States for an allowance of $2 each, in addition to $12 75 each, which he had already received for the *five hundred* muskets previously delivered by him, was forwarded to the Treasury Department on the 16th day of July, A. D. 1842, with this explanation: "On the 9th of March, 1839, an assignment was made to Mr. D. Nippes of 1,000 muskets, at $12 25 *per* musket, which he has delivered." In the same letter inducements were held out to him for the manufacture of the new pattern musket, of which an assignment was made to him on the 8th of October, 1840, for the manufacture of eight hundred muskets *per annum* for five years, at the conditional price of $12 75 each. In the process of their manufacture it was found that $12 75 was not an adequate compensation, and it has now been established at $14 75, viz: $14 50 for the musket, and 25 cents for the appendages, at which price the five hundred already delivered, and those hereafter to be delivered, are to be paid for; and it is accordingly requested that the sum of one thousand dollars, being the amount of the annexed account, may be paid to Mr. D. Nippes out of the appropriation for "arming and equipping the militia."

G. TALCOTT,
Lieutenant Colonel of Ordnance.

WM. B. LEWIS, Esq.,
Second Auditor.

ORDNANCE OFFICE, *July* 16 1842.

Respectfully submitted to the Secretary of War for his approval.

G. TALCOTT,
Lieut. Colonel, Ordnance Department.

Approved July 16, 1842.

J. C. SPENCER,
Secretary of War.

This account was allowed and paid to the petitioner.

The petitioner having agreed to furnish *eight hundred* muskets a year from the 1st of January, A. D, 1841, to the 31st of December, A. D. 1845, but having, prior to the 20th of October, A. D. 1842, furnished only *five hundred*, he was authorized to deliver the remaining *three thousand five hundred* within the years 1842, 1843, 1844, and 1845, the deliveries in any one of those years not to exceed one thousand. (Letter of Colonel Talcott to the petitioner of October 20, A. D. 1842.)

On the 19th of December, A. D. 1844, the petitioner solicited a further contract, but the department had not then determined to make any other contracts for muskets. (Letter of petitioner to Colonel Talcott of December 19, A. D. 1844, and letter of Colonel Talcott to petitioner of December 20, A. D. 1844.)

On the 27th of February, A. D. 1846, the petitioner requested that he might be allowed to furnish an additional number of muskets; and on the 3d of March, A. D. 1846, he was authorized to furnish, in addition to the *four thousand* ordered of him in October, A. D. 1840, *one thousand six hundred* muskets at $14 50 each. (Letter of petitioner to Secretary of War of February 27, A. D. 1846, and letter of Colonel Talcott to the petitioner of March 2, A. D. 1846.)

On the 11th of February, A. D. 1847, the petitioner, in a letter to the Secretary of War, said: "Permit me to call your attention to a claim which I have against the United States, arising from the manufacturing and delivering of muskets under an engagement based upon a letter of Colonel Bomford, dated March 9, 1839. From this letter I expected to be placed upon an equal footing with the other manufacturers of muskets; but from the published report of the War Department, I have ascertained that Mr. Pomeroy received for two thousand one hundred muskets, $16 each, whilst I received but $14 50, having agreed to the receipt of this price under the belief at the time, from representations then made, as I understood them, that $14 50 was the *maximum* price; and as it has always been admitted that the muskets manufactured by me are equal to those manufactured by Mr. Pomeroy or at the armories, I consider my claim for the additional compensation upon two thousand one hundred muskets of $1 50 each to be founded upon pinciples of justice and equity, and trust that it will be so considered by the department. I would further beg leave to call the attention of the department to the fact that Mr. Pomeroy had awarded to him the manufacture of seven thousand muskets, whilst to me there was awarded but four thousand; and the outlay for machinery being

heavy, and as great upon the smaller number as the larger, Mr. Pomeroy thereby derived much greater advantage than I have. My expenditures for machinery have been far greater than the profits realized from the price received, and the machinery for any other purpose is but of trifling value, thereby making the loss to me heavy."

The petitioner denies that he ever agreed to receive $14 50 as the *maximum* price of each musket, and he alleges that he was grossly and fraudulently deceived by Colonel Talcott into an acceptance of that price and his subsequent acquiescence in it, and that he was not told by him that Pomeroy's first contract had been substituted by another on the 14th of March, A. D. 1842.

The petitioner presents his claim under two aspects.

1. Under an express contract.

Under this he claims that he is entitled to be paid for 4,000 muskets, at $18 50 each	$74,000
From which he deducts the amount actually received by him	58,000
Leaving the amount claimed	16,000

2. Under an implied contract.

Under this he claims that he is entitled to be paid for 4,000 muskets, at $19 44 each	$77,760
From which he deducts the amount actually received by him	58,000
Leaving the amount claimed	19,760

The petitioner alleges that the contract with him is the same in terms as that made with L. Pomeroy on the 26th day of February, A. D. 1840, but this is not shown by the evidence. Pomeroy's name nowhere occurs in the correspondence between the petitioner and the Ordnance office. The petitioner, in his letter to the Secretary of War, dated February 27th, A. D. 1846, mentions Pomeroy's name, but not to show that their contracts were originally the same, or with any reference to that subject. It appears from the testimony of W. C. Reddall, that it was his understanding that the two contracts were in substance the same; and that, under the instructions of Colonel Talcott, he prepared a written contract to be executed by the United States and the petitioner, with terms and conditions precisely similar to the terms and conditions of the contract between the United States and L. Pomeroy; and that it was not executed because the parties contemplated that the number of muskets to be furnished by him should be increased. The effect of this evidence is, at most, that such a contract was contemplated by the parties, but never actually made.

The contract between the petitioner and the United States is to be gathered from the correspondence between him and the Ordnance office. Such, we think, was the understanding of the parties. The petitioner,

on insisting that a specific contract should be made with him, was assured that he might safely rely on the letters of the Ordnance office. The contract, as presented by this correspondence, so far as it is necessary now to state it, was, that the petitioner should furnish eight hundred muskets a year for five years at a price to be regulated by the results at the national armories.

Such being the contract, there might be some difficulty in determining its construction, if the parties themselves had not settled it. What was meant by the language, "*regulated* by the results of the national armories?" How and by whom *regulated*? What was meant by "*the results* of the national armories?" The truth is, that on the 9th of March, A. D. 1839, it was not known by either party what would be a fair price, and that was left for future arrangement; but how or to what extent reference was to be had in making that arrangement to "the results of the national armories," we need not now determine. The price was fixed by the mutual consent of the parties, and in a manner obligatory on both, by the transactions of the 16th day of July, A. D. 1842. The petitioner must be presumed to have been cognizant of these transactions, and to have assented to them. He received the money then allowed, and is presumed to have known and assented to the grounds on which the allowance was made. They were matters in which he was directly interested, taking place and entered of record in a public department, and it was no less his duty than his privilege to have taken notice of them. They could not have taken place without his consent, unless the public officers had been guilty of a breach of duty. The basis on which the allowance was made to him had reference not only to the past, but the future; it recited that $14 75 each had been established as the price as well for the muskets which had been as for those which were to be delivered by the petitioner. The petitioner must be presumed not only to have known, but to have assented to this. The price could not have been established without the mutual consent of the parties.

Such, we think, is the proper view of this case, independently of any admissions on the part of the petitioner. But the petitioner, in his letter to the Secretary of War of February 11, A. D. 1847, expressly states that he agreed to the price of $14 50 for each musket. It is true that in that letter he alleges that he was misled by the representation that $14 50 was the *maximum* price. If the proof of his assent depended on this letter, it might be urged that his whole admission must be taken together; but his assent, as we have seen, otherwise appears. As to the allegation of fraud or misrepresentation to his prejudice, the burden of proof is on the petitioner, and there is not a particle of evidence in this case to sustain it.

The contract between the United States and the petitioner, and that between the United States and L. Pomeroy, were two distinct and independent transactions, having no connexion whatever with each other. Moreover, the arrangement between L. Pomeroy and the United States of the 17th of March, A. D. 1842, was plainly upon its face a compromise, and, for that reason, could not be relied on as a guide for an adjustment of price between the United States and the petitioner. It is plain, therefore, that upon no principle was there

any obligation on the part of the United States at any time to communicate to the petitioner what had taken place between them and L. Pomeroy

Our opinion is, that the petitioner is not entitled to relief.

LORING, J. I concur in the result of the opinion read in this case.

36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REP. C. C. No. 255.

JOHN P. NORTON.

MAY 2, 1860.—Reported from the Court of Claims, committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

JOHN P. NORTON *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documentary evidence offered by claimant, transmitted to the House of Representatives.
3. Claimant's brief.
4. United States solicitor's brief.
5. Opinion of the court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, at Washington, this first day of May, A. D. 1860.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE COURT OF CLAIMS.

JOHN P. NORTON *vs.* THE UNITED STATES.

Petition.

To the Court of Claims:

Your petitioner, John P. Norton, of Edgartown, in the State of Massachusetts, respectfully represents that he was collector of customs for the district of Edgartown for twelve years, from the year 1829 to 1841, and during the years 1839 and 1840 did, by the directions of

the Secretary of the Treasury, by circulars dated the 6th and 22d of June, 1839, collect and secure alien tonnage duty, light money, and duties on oil and whalebone imported in registered vessels employed in the whale fishery, to the amount of one hundred and seventy-nine thousand seven hundred and four dollars; on which amount, by the act of 1799, the said petitioner was entitled to three per cent. as commissions for his services, and accordingly charged the same, amounting to five thousand three hundred and ninety-one dollars and sixteen cents in his account rendered for the third quarter of 1839, and the first and second quarters of 1840; but his commissions were disallowed by the department in the year 1840. That your petitioner submitted a petition to Congress at the ensuing session of Congress, and also to the 27th, 28th, and 31st Congresses, praying that the proper allowance might be made to him, and his petition was referred to the Committee on Commerce, but no further action was taken on the claim.

Your petitioner prays that the court will report a bill for his relief. And will ever pray.

JOHN P. NORTON.

STATE OF MASSACHUSETTS, *County of Dukes:*

This day personally appeared the above-named John P. Norton, and made oath that he verily believes the above statements by him subscribed to be true.

Before me.

DAVID DAVIS,
Justice of the Peace.

APRIL 22, 1859.

Papers furnished by Treasury Department.

TREASURY DEPARTMENT, *October* 13, 1859.

Pursuant to the act of Congress of 22d February, 1849, I hereby certify that the annexed are true copies from the records and files of this department.

In witness whereof, I have hereunto set my hand and caused the [L. S.] seal of the Treasury Department to be affixed on the day and year first above written.

HOWELL COBB,
Secretary of the Treasury.

Commissioner of Customs to the Secretary of the Treasury.

TREASURY DEPARTMENT,
Office of Commissioner of Customs, October 11, 1859.

SIR: In compliance with the reference to me of the papers transmitted to you by the Court of Claims, on the case of John P. Norton, formerly collector of customs at Edgartown, Massachusetts, claiming

to be allowed the sum of $5,391 11 for a commission of 3 per cent. on $179,704, for alien tonnage duty, light money, and duties on oil and whalebone introduced into that district in registered vessels employed in the whale fisheries in the years 1839 and 1840, I have the honor to report:

That it appears, from an examination of the accounts of Mr. Norton, as adjusted at the treasury, that he took bonds for the above amount, under the circular instructions of the First Comptroller, dated the 6th and 22d of June, 1839, as stated in his petition.

These instructions were issued in view of the decision given by Judge Story, in the case of the United States *vs.* William Rogers and others, at the June term of the district court at Newport, in 1838. It further appears, from his accounts, that the entire amount of the bonds thus taken were cancelled by the authority of the Secretary of the Treasury, under the provisions of the act of Congress approved April 4, 1849.—(Stat. at Large, chap. 6, p. 370.)

Bonds, under the instructions referred to, were taken at several of the eastern ports, and the question of the allowance of commission on the amount of duties represented by said bond was presented to the Comptroller by the First Auditor, in his letter dated the 20th of December, 1839. This letter, with one from the Comptroller, dated January 7, 1840, was submitted to the Secretary of the Treasury for his decision; and the Secretary, by his letter dated the 20th of January, 1840, decided that, as these duties were exacted as a penalty, the collectors were not entitled to commissions.

Copies of the several letters herein referred to, with the decision of Judge Story, and a copy of the Comptroller's circular of the 7th of April, 1840, with the act of April 4, 1840, annexed, addressed to collectors, &c., for their information and government, will, it is believed, furnish an intelligible view of the whole subject, and are herewith respectfully submitted, marked from No. 1 to No. 7.

It is deemed proper, in this connexion, to state that the compensation of Mr. Norton was limited to $3,000 a year by the 10th section of the act of the 7th of May, 1822, chapter 91, volume 3, page 689, and that had commissions been allowable in these cases, he would not have been entitled legally to the amount claimed, but only to such portion thereof as, with the amount received in each of the years mentioned, 1839 and 1840, would have been required to make up his annual maximum.

The papers are herewith returned.

Very respectfully,

SAMUEL INGHAM,
Commissioner of Customs.

Hon. HOWELL COBB,
Secretary of the Treasury.

No. 1.

Circular to collectors, naval officers, and surveyors.

TREASURY DEPARTMENT,
First Comptroller's Office, June 6, 1839.

From the results of recent trials in the courts of the United States, it appears that American vessels sailing under *registers*, and without being enrolled and licensed, have, in violation of law, been for many years engaged in the whale fisheries.

On full examination of the records of this department, it is evident that this course has been adopted without its sanction, and it becomes matter of regret that a practice so erroneous should have been introduced and suffered so generally to be pursued, being contrary to the instructions of this office contained in the circular of December 28, 1793, and its decisions in special cases submitted to it; and also in disregard of existing laws as construed by the United States courts, subjecting such vessels, on their arrival, to foreign tonnage and duties, and in some cases to forfeiture of vessel and cargo, and while at sea alienating the American character of the vessel, and thus losing the wholesome protection of the laws against the revolt of their crews.

Owners and masters of such vessels now in port, or which may hereafter arrive, under these circumstances, will perceive the necessity of surrendering, or causing to be surrendered, the registers of their vessels, and having them enrolled and licensed, according to law, before proceeding to sea, and of pursuing such other measures for their own security as the important interests involved would seem to indicate.

By the sixth section of the act of the 18th of February, 1793, if at the expiration of the year for which the license is given the vessel be at sea, and the master shall, within forty-eight hours after his arrival, deliver to the collector of the district in which he shall first have arrived the license which shall have expired, and make oath that it expired whilst at sea, taking the certificate of the collector therefor, as provided in the ninth section of the same act, with which to proceed to his proper district, the forfeiture of the vessel and cargo, or payment of foreign tonnage and duties, as the case may be, is avoided.

The limited duration of the license, as is contended for by some, would not, therefore, appear to have been a sufficient reason for this clear deviation from existing laws.

Consequently, with a view to secure to such enrolled and licensed vessels all the benefits, privileges, and protection of those laws, collectors of the customs are authorized and directed, on application, besides the papers before mentioned, to grant to such vessels general clearance, passport, bill of health, sea letter, and permit to touch and trade at any foreign port or place during the voyage, together with a certified copy of the crew-list. On the clearance of such vessels they will, in pursuance of the twenty-first section of the act cited, require from the master that his manifest of outward cargo be verified on oath, and on their arrival in port the manifest and entry of inward cargo must, in like manner, be verified.

With respect to the cases of vessels sailing under registers which

have recently returned from whaling voyages, as well as those of vessels which hereafter may arrive, until further legislation, the existing laws must be enforced, as it regards the duty on the tonnage of the vessel and on the cargo, if it be of dutiable character, as well as other legal liabilities, the remedy for relief for any penalty, forfeiture, or disability incurred by such vessel being in remission by the Secretary of the Treasury, where his legal power may be exercised and the case shall justify his interference, or with Congress in regard to the duties.

The papers herein directed to be issued being such as are made necessary for vessels employed in the foreign trade, with the exception of the permit to touch and trade, as prescribed in the circular of the 28th December, 1793, it is presumed that collectors of the customs will encounter no difficulty in the premises.

Proper notice should, however, be given to the owners and masters of whaling vessels of the nature and object of these instructions, that they may incur no injury in neglecting to conform to them.

It has been made a question whether vessels sailing under enrolments and licenses, with the papers before enumerated, might not take on board goods to be landed at foreign ports, with the right of drawback.

In view of such privilege, none but registered vessels, under existing laws, being permitted to engage in the foreign trade, it is the opinion of this department that it cannot be extended to vessels enrolled and licensed.

Another matter as respects vessels enrolled and licensed for the coasting trade is of sufficient importance to claim your attention.

Frequently applications are made by purchasers of coasting vessels, sold or transferred by process of law, to have them enrolled and licensed, in consequence of former owners withholding the old papers.

The proviso in the act of the 2d of March, 1797, obviates any distinction that may have been taken in practice between the papers of those and other vessels, and it is conceived that if the old papers of such vessels be not surrendered on the change of property, the former owner or owners incur the penalty prescribed in the fourteenth section of the act of December 31, 1792, to be recovered with costs of suit.

It is proper to add that these instructions have the approbation of the Secretary of the Treasury

I am, very respectfully, sir, your obedient servant,

J. N. BARKER, *Comptroller.*

No. 2.

Circular supplementary to collectors, naval officers, and surveyors.

TREASURY DEPARTMENT,
First Comptroller's Office, June 22, 1839.

SIR: Inquiries having been made of this department on the part of some of the collectors of those districts to which registered whaling vessels belong in relation to the particular duties and penalties to be imposed on such of said vessels and their cargoes as may return to

port without having the requisite papers in force, it is found expedient that you should be informed:

1. That if a whaling vessel come into port, not having been enrolled and licensed, as, by the recent decision of Mr. Justice Story, she cannot be considered a vessel entitled to the privileges of an American vessel employed in the fisheries, you have no alternative but to exact alien duty on the cargo, if it be subject to duty, according to the rates in force, and on the tonnage of the vessel, that is to say, one dollar per ton, being fifty cents per ton for tonnage duty, and fifty cents per ton for light money, the act of March 27, 1804, making the collection of light money consequent on the imposition of alien tonnage duty.

2. That a whaling vessel under like circumstances is not considered subject to the hospital tax, inasmuch as the act of July 16, 1798, imposes the tax only on the crews of vessels of the United States; and the recent decision of Mr. Justice Story determining a registered whaler not to be such a vessel in contemplation of law, she is consequently exempt from the tax.

3. That the sixth section of the act of February 18, 1793, in relation to the enrolling and licensing of vessels to be employed in the coasting trade or fisheries, having especial reference to vessels found trading between district and district, or between different places in the same district, it is the opinion of this department, taking into view the proviso in the fourth section of the act of March 1, 1817, that a registered whaling vessel does not come within the operation of the first-mentioned section as respects the forfeiture by sailing from one port of the United States to another port thereof with the fruits of her enterprise, say oil and lime, or with such cargo as may have been taken in by her at a foreign port for the purpose of delivering the several portions of said cargo according to its destination, but she will be liable to tonnage duties and light money at every port of arrival.

4. That although, under these circumstances, a registered whaling vessel may readily avoid incurring a forfeiture, the exaction of alien duties of tonnage and import being an inevitable consequence of the recent decision of Mr. Justice Story, it is conceived that no officer of the government has a right to undertake the remission of said duties; and therefore in such cases, if relief be sought, a protest should be filed, and application being made to Congress to obtain it, the collection of the duty bonds will probably be postponed till Congress decides.

5. That whaling vessels duly enrolled and licensed, and having permission to touch and trade at a foreign port, are not, on their arrival, subject to the hospital tax, within the meaning of the act of 1798, if it shall appear that they have not used such permission further than to procure the necessary supplies; but if they, on coming into port, have foreign goods on board, as it will then be manifest that they have been engaged in trading abroad, within the fair meaning of the term, it is conceived that the tax should be collected of the crews according to the provisions of the act before cited.

6. That in view of the ancient usage at some of the ports, and

until Congress shall have an opportunity to legislate on the subject, the circular of the 6th instant, to which this is additional, is not to be considered as having reference to the case of any registered whaling vessel whose cargo had passed the custom-house before you received it, unless such case was specially presented to the department and decided upon.

It would be most gratifying to the department if it could feel itself authorized under existing laws to extend in other respects further immediate relief to those engaged in the whale fisheries; but whatever may have been its opinions, from time to time expressed on special cases, not involving the questions now at issue, or the inferences drawn from those opinions, or however it may be presumed to have acquiesced during former years in an erroneous practice, introduced and extended so silently and gradually as at no time to excite its special notice, it cannot now, when its attention is called to the subject by a judicial decision, hesitate to sustain the officers of the customs in carrying out the clear and explicit construction of the law as given by Mr. Justice Story until Congress think proper to amend it.

A copy of the opinion, as furnished to this office, is hereto appended for your information.

I have only to add that the Secretary of the Treasury concurs in these views.

I am, very respectfully, your obedient servant,

J. N. BARKER,
Comptroller.

No. 3.

UNITED STATES *vs.* WM. ROGERS AND OTHERS.

June term, 1838—*at Newport.*

Indictment against the defendants for an endeavor to commit a revolt on the 10th day of May, 1838, on board the brig Troy, belonging to Bristol, Rhode Island, alleged to be a registered ship, owned by certain citizens of the United States, named in the indictment, and the defendants being seamen in and on board thereof, against the act of the 3d of March, 1835, chapter 40. Plea, not guilty.

At the trial it was admitted by Green, the district attorney, that the brig was, at the time when the supposed offence was committed, (May, 1838,) engaged in a whaling voyage, and her crew were, by the shipping articles, in the same year shipped for a whaling voyage. The ship's register was dated in 1833, and the voyage was undertaken without any surrender of the register or taking out an enrolment and license pursuant to the act of the 18th of February, 1793, chapter 52, for enrolling and licensing vessels employed in the coasting trade and fisheries.

Upon this statement, which was agreed to be the truth of the case, the court suggested a doubt whether the offence, if any, was, under the circumstances, within the purview of the statute; and the case

was spoken of by Green, district attorney, Randolph and Pearce being counsel for the defendants.

Story, J.—I am unable to persuade myself that the present indictment is maintainable under the circumstances. The act of 1835, chapter 40, provides that, "if any one or more of the crew of an American ship or vessel on the high seas, &c., shall endeavor to make a revolt," he and they shall, on conviction, be punished as provided for in the act.

To bring the case within the statute the voyage for which the seamen are shipped must be a lawful one, and they must at the time be of the "crew" of an American ship or vessel; and of course there must exist a lawful relation between them and the master.

The statute of 1793, chapter 52, section 1, enacts that such ships or vessels as are enrolled and licensed according to the provisions of that act, "and none others, shall be deemed ships or vessels of the United States entitled to the privileges of ships engaged in the coasting trade or fisheries;" and the whale fisheries are expressly within the purview of the act, as is abundantly seen in the form of the license prescribed by the fourth section.

Now, it seems plain to me that no registered ship is entitled to carry on the usual fisheries as an American ship, or as being entitled to the privileges of an American ship under the statute of 1793, chapter 52. The third section declares that it shall be lawful for the collectors of the several districts to enrol and license any ship or vessel which may be registered, upon such registry being given up, or to register any ship or vessel that may be enrolled, upon such enrolment and license being given up; and the sixth section treats every ship and vessel not so enrolled and licensed and found engaged in the trade as liable to pay the same fees and tonnage in every port of the United States as ships or vessels not belonging to a citizen or citizens of the United States; and under certain circumstances the ship or vessel and its lading become liable to forfeiture.

My opinion, therefore, is that this ship cannot be deemed an American ship within the sense of the third section of the statute of 1835, chapter 40, on which this indictment is founded, and the crew are not the crew of such an American ship or vessel as is contemplated by the act. On this ground the indictment would fail upon the facts.

Indeed, my impression is that upon the manifest intent of the act of 1793, chapter 40, no registered ship or vessel can, while she remains registered, engage in the whale fisheries; but she must surrender her register and be enrolled and licensed for the fisheries; and that if she should be found engaged in such fisheries without such enrolment or license, at least, if she has on board any article of foreign growth or manufacture, or distilled spirits, other than her stores, she would be forfeited. The main purpose of the act would be utterly frustrated upon any other construction, and the main securities and privileges of the trade be defeated.

The district judge concurred in opinion that the facts did not support the indictment, and thereupon the district attorney entered a *nolle prosequi*.

No. 4.

First Auditor to the Comptroller.

TREASURY DEPARTMENT,
First Auditor's Office, December 20, 1839.

SIR: In the settlement of the account of Robert S. Smith, collector of customs at New Bedford, I have disallowed the commissions claimed by the collector on the duties charged on whaling ships and their cargoes, and afterwards remitted by the Secretary of the Treasury.

These vessels and cargoes, I understand, were, in fact, American, but, in consequence of some irregularity in their papers, became liable to the payment of foreign duties. On the question of their collection being presented to the department, it was determined, as I believe, that they should be secured *pro forma*, with a perfect understanding that as soon as the facts should be presented to the Secretary, in the manner required, they would be remitted. So that, in point of fact, the duties never were *collected* or *received* by the collector, nor never were intended to be collected.

Under these circumstances I have deemed it my duty to disallow the collector's claim to commissions, and to call your attention to the subject. I will thank you to inform me at your earliest convenience of the decisions you may come to on the point submitted, as there are other accounts to be acted on in this office in which similar charges will no doubt be made. The commissions in controversy in Mr. Smith's account amount to $5,211 45.

I am, very respectfully, your obedient servant,

J. MILLER.

JAMES N. BARKER, Esq.,
Comptroller of the Treasury.

No. 5.

First Comptroller to the Secretary.

TREASURY DEPARTMENT,
First Comptroller's Office, January 7, 1840.

SIR: Under date of the 20th ultimo the First Auditor of the Treasury submitted the question, as you will perceive by his letter herewith, whether the collectors of those ports at which whaling vessels have arrived are entitled to commissions on the bonds taken, and other exactions made in conformity with the instructions it became necessary to issue, and which are sufficiently understood to render explanation unnecessary.

On an examination of the law, and considering the usage at the treasury which had restricted the allowance of commission to the moneys *actually collected* and *accounted for*, I have entertained doubts of the authority vested in me for an extension of the principle; but

the striking analogy of the question presented with that—the subject of a communication from this office on the 17th of June, 1836, in regard to railroad iron—has persuaded me to submit the whole subject for your consideration.

I beg leave, also, to enclose a memorandum in illustration of the principle which has governed the allowance of commissions to collectors by the accounting officers, which, in connexion with the letter of the Auditor, it seems to me, will clearly present the subject-matter in its true light.

I have the honor to be, with great respect, your obedient servant,

J. N. BARKER, *Comptroller*.

Hon. LEVI WOODBURY,
Secretary of the Treasury.

No. 6.

Secretary's Decision.

TREASURY DEPARTMENT,
January 20, 1840.

SIR: In answer to the question submitted in your communication of the 7th inst., and accompanying one from the First Auditor, to wit, whether certain collectors of the customs are entitled to commissions on the duties charged on whaling ships and their cargoes, I would observe that, in my opinion, these officers are not entitled to commissions in such cases, as they do not come within the principle decided in the case of railroad iron, to which you refer.

It is true that in both these cases the duty was refunded, but in one the duty was exacted in the nature of a penalty, but not so in regard to the other.

Very respectfully,

LEVI WOODBURY,
Secretary of the Treasury.

J. N. BARKER, Esq., *Comptroller*.

No. 7.

Circular to collectors, naval officers, and surveyors.

TREASURY DEPARTMENT,
First Comptroller's Office, April 7, 1840.

I transmit herewith, for your information and government, a copy of an act approved the 4th instant, entitled "An act to cancel the bonds given to secure duties upon vessels and their cargoes employed in the whale fishery, and to make registers lawful papers for such vessels."

Very respectfully, your obedient servant,

J. N. BARKER, *Comptroller*.

AN ACT to cancel the bonds given to secure duties upon vessels and their cargoes employed in the whale fishery, and to make registers lawful papers for such vessels.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That all vessels which have cleared, or hereafter may clear, with registers for the purpose of engaging in the whale fishery, shall be deemed to have lawful and sufficient papers for such voyages, securing the privileges and rights of registered vessels and the privileges and exemptions of vessels enrolled and licensed for the fisheries; and all vessels which have been enrolled and licensed for like voyages shall have the same privileges and measure of protection as if they had sailed with registers, if such voyages are completed, or until they are completed.

SEC. 2. *And be it further enacted*, That all the provisions of the first section of the act entitled "An act supplementary to the act concerning consuls and vice-consuls, and for the further protection of American seamen," passed on the 28th day of February, Anno Domini, eighteen hundred and three, shall hereafter apply and be in full force as to vessels engaged in the whale fishery, in the same manner, and to the same extent, as the same is now in force and applies to vessels bound on a foreign voyage.

SEC. 3. *And be it further enacted*, That all forfeitures, fees, duties, and charges of every description required of the crews of such vessels, or assessed upon the vessels or cargoes, being the produce of such fishery, because of a supposed insufficiency of a register to exempt them from such claims, are hereby remitted; and all bonds given for such cause are hereby cancelled, and the Secretary of the Treasury is hereby required to refund all such moneys as have been, or which may be, paid into the treasury, to the rightful claimants out of the revenues in his hands.

Approved April 4, 1840.

TREASURY DEPARTMENT,
Office of Commissioner of Customs, December 10, 1859.

SIR: In answer to the verbal inquiry made by you yesterday, as to how much of the amount claimed by John P. Norton, formerly collector, &c., of Edgartown, Massachusetts, for commissions on bonds taken for duties on whale oil, &c., in the years 1839–'40, would be required to make up his maximum compensation of $3,000 a year, as limited by the 10th section of the act of May 7, 1822, if the Court of Claims should decide commissions to be allowable in such cases, I have to state that the amount of compensation received by

Mr. Norton in 1839 was - - - - -	$1,012 04
The amount required to make up the maximum for that year would be - - - - - -	1,987 96

The amount of compensation received by him in 1840 was	1,107 24
The amount required to make up the maximum for that year would be - - - - - -	1,892 76
The amount claimed by Mr. Norton in his petition is -	5,390 11
Amount required to make up his maximum, as above -	3,880 72
Difference - - - - -	1,509 39

Very respectfully, your obedient servant,

SAM'L INGHAM,
Commissioner of Customs.

MONTGOMERY BLAIR, Esq.,
Attorney at Law, Washington, D. C.

IN THE COURT OF CLAIMS.

JOHN P. NORTON *vs.* THE UNITED STATES.

Agreement.

It is agreed by the parties in the above-entitled cause that commissions were allowed to the collectors of customs on the duties on railroad iron bonded under the act of 1832, in pursuance of a decision made by the Comptroller of the Treasury in 1836, and approved by the Secretary of the Treasury.

M. BLAIR,
Counsel for Petitioner.
R. H. GILLET,
Solicitor of the United States.

Dated October 28, 1859.

TREASURY DEPARTMENT, *October* 27, 1859.

The facts set forth in the above statement are in accordanee with the records of the Treasury Department.

GILBERT RODMAN, *Chief Clerk.*

IN THE COURT OF CLAIMS.

JOHN P. NORTON *vs.* THE UNITED STATES.

Brief of counsel for petitioner.

The right to recover in this case depends on the validity of the distinctions taken by Mr. Woodbury (p. 23, record) between the nature of the bonds taken in this case and those taken by collectors for the duties on railroad iron. The right of the collector to com-

missions on the last case was deemed complete by his securing the duties by taking bonds. The *actual* payment was not deemed necessary to complete his right, such payment being generally made into bank—the public depository—with no further trouble on his part, and being waived altogether by the United States in that case. But in the first case the same services were held not to entitle the collector to fees, because although the department and the courts held that the articles were subject to duties as foreign merchandise, not being imported in vessels which the law regarded as American vessels, yet as the vessels were in part American, and were denied that character only because they were not enrolled and licensed, the Secretary considered the imposition of the duty as in the nature of a penalty. It cannot be said with propriety that a man is subjected to a penalty who is only denied a *privilege*, and is denied such privilege because he fails wilfully to comply with the terms upon which the law admits any one to enjoy it. The statute of 1793 (ch. 52, sec. 1) enacts, says Judge Story, (p. 17, record,) "that such ships or vessels as are enrolled and licensed according to the provisions of that act, 'and none others, shall be deemed ships or vessels of the United States entitled to the privileges of ships engaged in the coasting trade or fisheries' and the whale fisheries, are expressly within the purview of that statute;" and he refused to punish seamen who were guilty of revolting on a *registered* vessel of the United States engaged in such trade because it could not be deemed an American vessel. Such vessels were, therefore, in law, as much foreign vessels as if built and manned in a foreign country, and the executive and judicial officers of the government were bound to recognize this fact in all their reasoning, and give effect in their action to all its legal consequences. The vessel had not that title by which alone it could be held by such officers to be an American vessel; and although the fact might be that it was built and manned by Americans, and so had the requisites to have procured an enrolment and license, yet, as it had not this paper title, it could not be considered as having it for any purposes by the executive and judiciary with any greater propriety than the owner would have been regarded by the courts as the owner of real estate to which he had not the proper title required by law. And Mr. Woodbury gave effect to this construction of the law in all respects, save only in refusing to allow the collectors their commissions. In the circular of the Comptroller of June 22, 1839, whilst he says "that a registered whaling vessel may readily avoid forfeiture," he adds (p. 15) that "the exaction of alien duties of tonnage and import being an inevitable consequence of the recent decisions of Mr. Justice Story, it is conceived that no officer of the government has a right to undertake the remission of said duties; and therefore, in such cases, if relief be sought, a protest should be filed, and application being made to Congress to obtain it, the collection of the duty bonds will probably be postponed till Congress decides."

He concludes by saying "that the Secretary of the Treasury concurs in these views."

The duties were therefore decided not to be a forfeiture in this very case by Mr. Woodbury himself, who would have had authority to have

remitted the duties, under 1st section of act 1797, (1 Stat., 506,) if they could have been regarded as a forfeiture. Not having that power, he referred the parties to Congress, which, by the 3d section of the act of 1840, (5 Stat., p. 370,) cancelled the bonds.

There was therefore nothing of the nature of a forfeiture as defined and known to the law in the duties imposed on those whaling vessels and their cargoes, and nothing therefore to distinguish the right of the collectors to commissions on the duties imposed on them from the commissions allowed on duties upon railroad iron. Congress, for reasons of public policy, ordered the bonds taken in both classes of cases to be cancelled; and Congress alone had power to remit these duties, not being in either case in any sense forfeitures, and therefore not subject to be remitted by the Secretary of the Treasury.

M. BLAIR.

IN THE COURT OF CLAIMS.

JOHN P. NORTON *vs.* THE UNITED STATES.

SOLICITOR'S BRIEF.

Claim for commissions on certain bonds given to secure alien tonnage duty, light money, and duties on oil and whalebone, which were released by act of Congress.

MATERIAL AVERMENTS CONTAINED IN THE PETITION.

1. That claimant was collector of the customs at Edgartown, Mass., from 1829 to 1841.

2. In 1839 and 1840 he collected $179,704 of alien tonnage duty, light money, and duties on oil and whalebone imported in registered vessels employed in the whale fishery, and that he did so under a treasury circular dated the 6th of June, 1839.

3. That under the compensation act of 1799 he was entitled to charge a commission of three per cent., and these amounted to the sum of $5,391 16, which he stated in his accounts rendered for the third quarter of 1839 and first and second quarters of 1840, but which were disallowed.

MATERIAL FACTS AS UNDERSTOOD BY THE SOLICITOR.

1. That Norton was collector as he states.

2. That he collected no money, but took bonds for the amount, which he states that he collected.

Mr. Ingham, Commissioner of Customs, says: "It appears, from the examination of the accounts of Mr. Norton, as adjusted at the treasury, that he took bonds for the above amount ($179,704 16) under the circular instructions of the First Comptroller, dated the 6th and 22d of June, 1839, as stated in his petition." "It further appears,

from his accounts, that the entire amount of the bonds thus taken was cancelled by the authority of the Secretary of the Treasury, under the provisions of the act of Congress approved April 4, 1840."—(R., p. 6.)

3. That Mr. Norton, as collector, was entitled by law to retain for his services, derived from all sources, only the sum of $3,000 per annum.

The act of May 7, 1822, regulating the compensation of custom-house officers, (3 U. S. Laws, 695, § 10,) provides: "That whenever the emoluments of any other collector of the customs (besides certain enumerated ones who do not embrace Edgartown) shall exceed three thousand dollars, or the emoluments of any naval officer shall exceed two thousand five hundred dollars, or the emoluments of any surveyor shall exceed two thousand dollars, in any one year, after deducting therefrom the necessary expenses incident to his office in the same year, the excess shall, in every such case, be paid into the treasury for the use of the United States."

4. It does not appear what amount Norton received during the period specified from other sources than these commissions; that is, whether he received at the rate of three thousand or other less sum for his services.

5. That Congress, on the 4th of April, 1840, passed a law containing this provision, (5 U. S. Laws, 370, § 3:)

"That all forfeitures, fees, duties, and charges of every description required of the crews of such vessels (registered whale ships) or assessed upon the vessels or cargoes, being the produce of such fishery, because of a supposed insufficiency of a register to exempt them from such claims, are hereby remitted; and all bonds given for such cause are hereby cancelled, and the Secretary of the Treasury is hereby required to refund all such moneys as have been, or may be, paid into the treasury, to the rightful claimants out of the revenues in his hands."

The bonds in question were cancelled under this law by direction of the Secretary of the Treasury.

LEGAL PROPOSITIONS.

FIRST. *Under the facts disclosed in the evidence in this case, the collector was not entitled to the commissions claimed, because he did not collect the money on which they were to be estimated.*

The collection act of March 2, 1799, (1 U. S. Laws, 707, § 2,) provides: "There shall moreover be allowed to the several officers hereafter mentioned the following allowances and percentage: To the collectors of the district of New York, one-quarter per cent., * * * and to the collectors of all other districts three per cent. *on all moneys* by them respectively *received*, on account of the duties arising on goods, wares, and merchandise imported into the United States and on the tonnage of ships and vessels.

* * * * * * *

"SEC. 4. *And be it further enacted*, * * * That whenever a collector shall die or resign, the commissions to which he would have been entitled on the receipt of all duties bonded by him shall be equally divided

between the collector resigning or the legal representatives of such deceased collector and his successor in office, and for this purpose all the public or official books, papers, and accounts of the collector resigning or deceased shall be delivered over to such successor."

It is under this provision that the claimant charged the commissions now claimed. But it is perfectly certain that Norton did not receive money. He merely took bonds from persons agreeing to pay money, but which they never paid. The commissions authorized by the act of 1799 were intended to compensate the collector for the hazards run in receiving, keeping, and paying over to the government money actually received by him. There is a risk in so doing, both in counting and keeping, and also with reference to counterfeits. No fees were provided for taking these bonds. They stood upon the same footing as many other services performed by collectors for which no specific compensation was provided.

On the 10th of October, 1837, a law was passed (5 U. S .L., 205) authorizing an extension of the time of payment of duty bonds under certain circumstances. At and prior to that time credit was almost universally given for duties. This sweeping postponement of payment operated severely upon many collectors. Hence the law of 12th June, 1838, (5 U. S. L., 242,) was passed. This act is a legislative construction of the law concerning commissions on duty bonds. It provides that the collectors who took the original bonds should be entitled, when the money should be paid on the bonds given on the extension, to their commissions on the money so paid in the same, as if they had received it themselves, but limited such collectors to their maximum compensation. Without this special law, the collector who took the bonds could have no commission, even when the bonds were actually collected and paid in full to a subsequent collector, because the collector taking them had not actually received the money. If, on the cancellation of the old bond for any cause, the collector was entitled to commissions, the moment the original bonds were taken up he could have lawfully claimed them without a law. The same would be the case if the bonds were paid in to another person. But Congress thought that a special law was necessary to give the collector taking bonds commissions where he did not actually receive the money himself, and so they made a law to meet the case. There is no law to meet Norton's case, and therefore nothing can be allowed him.

The claimant seems to lay much stress upon the fact that commissions were allowed to importers of railroad iron whose bonds were cancelled. But it can have no effect upon this case. The action in the case of railroad iron cannot control here. If it was paid, as is admitted, it was simply a mistake in the construction of the law, if the same law applies. The Secretary thought that these commissions should not be allowed, and the reason he assigned may have been a legal and sound one. But if it was not, the one now given is legal and conclusive against the claim. If the department committed a blunder in the discharge of one duty, it is no reason for this court making a like mistake in the discharging those assigned to it by law.

SECOND. *If the claimant were entitled to any compensation for taking the bonds in question, he has not furnished the evidence necessary to determine what sum he is entitled to.*

The law of 1822 fixes a maximum for the collector at Edgartown. How much he received from sources other than these commissions he has not shown. Before he can be allowed anything he must show the state of his accounts for the time referred to. This he has omitted, and consequently the court cannot say whether he is entitled to anything or not. He may have received his maximum compensation.

R. H. GILLET,
Solicitor.

Dated December 6, 1859.

IN THE COURT OF CLAIMS.

April 16, 1860.

JOHN P. NORTON *vs.* THE UNITED STATES.

LORING, J., read the opinion of the court.

The petitioner was collector of customs for the district of Edgartown, in the State of Massachusetts, in the years 1839 and 1840, and as such, under instructions from the Treasury Department, (shown in the record, pp. 10 to 17,) took bonds for alien duties on oil and whalebone brought into that district in whaling ships owned by our citizens, but which were not licensed for the whale fishery, and had registers only.

By act of Congress of April 4, 1840, (5 U. S. L., 370,) the bonds taken and outstanding were ordered to be cancelled, and all moneys received into the treasury on such bonds as had been paid were ordered to be refunded to the rightful claimants.

The amount of the bonds taken by the petitioner was ($179,704) one hundred and seventy-nine thousand seven hundred and four dollars, and, under the act of March 2, 1799, (1 U. S. L., 707,) he claimed, as a part of his official compensation, three per centum on the said sum, amounting to ($5,391 16) five thousand three hundred and ninety-one dollars and sixteen cents, and charged the same in his accounts rendered to the department for the third quarter of 1839 and the first and second quarters of 1840; but this claim for commissions was disallowed by the department in 1840, on the ground that the alien duties for which the bonds were taken were "in the nature of a penalty."—(p. 23.)

The petitioner makes here the same claim for commissions which was rejected at the treasury, and as his maximum of official compensation is limited by law to $3,000, he claims so much of said commissions as, with his receipts, will make up said maximum, viz:

For 1839 - - - - - -	$1,987 96
For 1840 - - - - - -	1,892 76
In all, the sum of - - - -	3,380 72

To this claim it is objected on the part of the United States, as was objected at the treasury, (p. 23,) that the duties for which the bonds were given were penalties, or in the nature of penalties, which the United States might lawfully remit at any time before the money of the bonds were received by the collector. This is denied on the part of the petitioner, and thus the question is raised, whether alien duties and fees imposed on our vessels engaged in the whale fishery, and not licensed, but registered only, were, in 1839–'40, penalties, or in the nature of penalties.

The act of 1793, (ch. 8, sec. 1, 1 U. S. L., 305,) enacts (as to vessels of twenty tons and upwards) that those enrolled and having a license in force, "and NO OTHERS, shall be deemed ships or vessels of the United States entitled to the privileges of ships or vessels employed in the coasting trade or fisheries."

In 1839 or 1840, whaling vessels thus enrolled and licensed brought in their oil and bone free of duty, while other whaling vessels, being, as to the privileges of the fisheries, not vessels of the United States, but foreign vessels, paid duties as such, or alien duties.

But a license for the whale fishery did not legalize or open the whale fishery for the licensed vessel; for that fishery was open to all the world, and our laws contemplated that whaling vessels of other countries would import here their oil and bone, and made provision for it by fixing the duties for them. It is perfectly clear that such duties, on such alien vessels, were not penalties or in the nature of penalties, and how, then, do the same duties become penalties when assessed on our registered vessels because they are taken to be alien vessels, and treated as such, for want of the evidence that they are vessels of the United States?

There is no law prohibiting our registered vessels from engaging in the whale fishery, or which indicates any purpose of putting them on a worse footing in that fishery than vessels of other countries, or of making that in them *an offence*, subject to *a penalty*, which in vessels of other countries is a lawful traffic, subject only, as their other lawful traffic is, to duties for revenue.

On the contrary, the act of 1789 (ch. 11, sec. 23, U. S. L., 55) expressly provided that registered vessels should be of right "*entitled*" to a license for the whale fishery, and that it should be "*the duty of the collector to grant the same.*" It thus afforded to our vessels double advantages, viz: by their register the privilege of vessels of the United States in foreign trade, and also by their licenses the privileges of vessels of the United States in the whale fishery. The act of 1793 (ch. 8) did not continue this double privilege; but by its third section (requiring registered vessels to surrender their registers to be licensed, and licensed vessels to surrender their licenses to be registered) it confined "vessels of the United States," as such, to one privilege; and

thus left registered vessels in any traffic not covered by their registers, and, consequently, in the whale fishery, without privilege as vessels of the United States and to be considered as foreign vessels, and subject as such to alien duties on their oil and bone. But the sixth section of the act, which subjected to forfeiture whaling vessels unlicensed and found to have foreign goods on board, expressly excepted registered vessels from its operation. The words are: "every ship or vessel, (*other than registered vessels.*") This exception permitted vessels whaling under a register only, to bring in foreign goods and their oil and bone in the same cargo, paying on the latter the alien duties for which the bonds in this case were taken. Then the act of April 4, 1840, (subsequent to this transaction, and set forth in the record, p. 24,) relieved such registered vessels from alien duties, and declared that their registers should entitle them "to all the privileges and exemptions of vessels enrolled and licensed for the fisheries."

From this legislation, and the fact that the whale fishery has always been open to foreign vessels paying alien duties, I see no reason for inferring that the employment of registered vessels in the whale fishery paying alien duties has ever been considered to contravene the policy of our navigation laws, or any other public policy; nor that the alien duties on their oil and bone, to which such vessels were subject in 1839 and 1840, were penalties, or in the nature of penalties, or anything more than the revenue duties prescribed for the class of vessels to which they then belonged, viz: foreign vessels; for such they then were, in reference to the whale fisheries.

Upon this part of the case, therefore, I think the bonds taken by the petitioner were not for penalties, but for lawful duties, and that the commissions he claims would have been, if the bonds had been paid, a part of his stated annual compensation for his year's service, and not, like his legal proportion of penalties, a mere gift.

The petitioner urged his claim upon the ground of a usage in the department, and adduced as evidence of it the fact shown in the record, (pp. 21, 22, 23,) that when, by the act of July 14, 1832, (4 U. S. L., 604,) the bonds given for duties upon railroad iron were remitted, the collectors were allowed their commissions by the department. If, as has been argued, the bonds taken by the petitioner were not penalties, nor in the nature of a penalty, then the two cases are entirely analogous. But a single instance of the action of the department does not make a usage, and cannot be authoritative on this court, which must rule the cases before it by the statutes and the law applicable to it.

And it is objected by the solicitor, secondly, that, "under the facts disclosed in the evidence in this case, the collector was not entitled to the commissions claimed, because he did not collect the money on which they were to be estimated."

This objection is founded on the words of the statute of March 2, 1799, (1 U. S. L., 707,) which allows collectors "three per cent. on all *moneys* by them respectively *received*," and I think this claim is answered by the objection.

It is true that where contracts for service for a price, are made between individuals, the contract vests a right to perform the whole service, and to earn and receive the whole compensation, and neither

party can alter the terms of the contract without the assent of the other. Therefore if the completion of the service, partially performed, is prevented by him who was to receive it, he may be sued upon the contract for the whole price, and he cannot plead in bar the non-performance he has himself caused, nor take advantage of his own wrong; he can only show, in reduction of the plaintiff's damages, what it would have cost him to complete the service.

But the engagements between the United States and its revenue officers are not such contracts; they are public agencies instituted for the public good, and are subordinate to that; and therefore they may be, and always have been, changed from time to time, either in the duties to be performed or in the compensation to be paid, as in the discretion of Congress public policy may require. Where a duty has been actually performed, and the compensation actually earned, then such compensation may be claimed as money due; for then the agency is executed, and then, and not till then, the rights of the officer are vested.

In Butler *vs.* Pennsylvania, (10 How., 418,) the Supreme Court cite and adopt the language used by Duncan, Justice, in The Commonwealth *vs.* Bacon, (6 Serg. and R., p. 232.) "The services rendered by public officers do not in this particular partake of the nature of contracts, nor have they the remotest affinity thereto. As to a stipulated allowance, that allowance, whether annual, per diem, or particular fees for particular services, depends on the will of the law-makers."

In this case, therefore, the petitioner took his office subject to this legislative control, and to its exercise for the public interest, in the particular in which the evidence shows it has been exercised, viz: the cancellation of the bonds taken by him. And the terms on which he so took office were the statute provision of three per cent. on the moneys *received*, as distinguished from the amount of the bonds. There are, then, no grounds on which his claim can be extended by this court beyond the statute provision.

The rule of law, and also the merits of the collector's claim in such a case as this, are shown in the case of the United States *vs.* Heth, (3 Cranch, 399.) There the collector had taken bonds under this statute of 1799, which fixed his compensation at three per cent. on the moneys received. After the bonds were taken, the act of 10th May, 1800, (5 U. S. L., 173,) reduced the commissions to two per cent. on moneys received for duties "arising on goods, &c., *imported*." After this enactment, the bonds were collected, and the collector claimed three per cent. under the act of 1799, while the United States objected that he was entitled only to two per cent. under the act of 1800. The claim of the collector was sustained. The judges delivered separate opinions, and Justice Cushing said: "When the former duties were secured by bond, the law considers them, I think, as far as regards the collector's allowance, as *collected* and *received*, the principal services being already done by securing the duties by bond." But it is observable that this proposition of the learned justice would entitle the collectors to their commissions on bonds not collected because they proved worthless, and that there is no rule for determining what proportion of service should earn the whole compensation, or what shall be taken as "the

principal services." And neither the court nor the learned justice rested the decision of the case on this proposition, but held that the construction of the statute upon all its terms made it applicable only to cases of goods "imported" after its enactment; and Justice Johnson said: "On behalf of the United States, it is contended that the rights of the collectors of duties with regard to their compensation are absolutely submitted to the will of Congress, which has uniformly increased or diminished that compensation as circumstances suggested the expediency of such a measure, without regarding any supposed limitation of their right to do so imposed by the claims of officers; that it has been the uniform policy of the government to apportion the commissions to the actual receipt of money; and therefore, whatever may have been the proportion of their labor or responsibility, their right to compensation was not consummated before the actual receipt of the duties, and the amount of their commission remained liable to be increased or diminished at the will of Congress; that in passing their act of May 10, 1800, they had a right to give it a retroactive operation, and the latter words of the 2d section, 'arising on goods imported,' will bear and ought to receive such a construction."

"At the same time that I admit the correctness of the prefatory remarks of the Attorney General, my mind is led to adopt a conclusion unfavorable to the construction which he contends for."

"The rights of collectors of duties as to their compensation are certainly submitted to the justice and honor of the country that employs them, until consummated by the actual receipt of the sums bonded in their respective offices; but when an individual has performed services under the influence of a prospect of a certain emolument, that confidence which it is the interest of every government to cherish in the minds of her citizens—a confidence which experience leaves no room to distrust in our own—would lead to the conclusion that it could not have been the intention of the legislature to defeat the reasonable expectation of her officer, suggested by her own laws."

The petitioner in this case performed his services (in the words of Justice Johnson) "under the influence of a prospect of certain emolument," and when the bonds were cancelled, "the pricipal services" had been already done, for the goods had been entered, and all the labor necessary for that, and all the responsibility incident to it, had been borne; the sufficiency of the bonds had been examined into, and all the expenses of rent, fuel, clerk-hire, and stationery, payable by the collector out of his receipts (if less than or only equal to his maximum) had been paid; so that the act of public policy which cancelled the bonds was at the expense of the collector, both as to his services and expenditures. Besides this, it may be said that the provision of the statute fixing the compensation of the collectors at three per cent. on moneys *received* was made in contemplation of the ordinary course of business in which all good bonds would be collected, and in reference to this its general purpose was to assure the watchful care of collectors in assuring the sufficiency of the bonds they took, and the due and prompt collection of them, and to absolve the United States from the charges of the collectors where the bonds taken by them proved insufficient; and that neither these reasons of policy, nor any reasons of policy, are

applicable to the case where the United States prevented the collection of the bonds taken by cancelling them.

And it is to be remembered that since the act of 1799, its allowance to collectors has been restricted to an annual maximum, and thus assimilated and reduced to an annual salary, deemed a just equivalent for a year's service. Here the year's service was rendered, and the further reduction of this annual stipend by a part always so material as the commissions on bonds taken, and which in this case amount to nearly half the annual maximum, may well defeat "the reasonable expectation of the officer" suggested by the laws. But, although these and such considerations may furnish grounds for an application for relief to Congress, they cannot make title to relief in this court, for they do not make a legal right under the act of 1799, nor establish a contract of legal obligation on the part of the United States.

It was argued for the United States that the commissions "were intended to compensate the collector for the hazards run in receiving, keeping, and paying over to the government the money actually received, * * * and that no specific compensation was provided for taking the bonds."

If this means that the commissions were not intended to compensate the particular services rendered in taking the bonds and incident thereto, it is not supported by the act. The 4th section of the act of 1799 divides the commissions on moneys received equally between the collectors who take the bonds and their successors in office who *collect* the bonds. And this is conclusive that the services and responsibility of the one equally with the other were matters for compensation by the commissions. Thus when the act of May 10, 1800, § 54, supplementary to the act of 1799, c. 23, directed that the collectors of Philadelphia, New York, Boston, Baltimore, and Charleston should deposit for collection in the Bank of the United States, &c., all bonds taken or to be taken for duties, it expressly provided that the commissions should be allowed to the collectors on all moneys collected by the banks "in like manner as if received by them," (the collectors.) Here not only were the services incident to taking the bonds considered matters for compensation by the commissions, but the whole commission was considered due to the collectors, where their receipt of the money on the bonds they had taken was prevented by the United States. This act shows what Congress considered to be justice to the collectors when the bonds are cancelled, and indicates that the action of Congress and a special provision are necessary to effect that justice.

On the whole case we are of opinion that the petitioner is not entitled to the relief which he claims in this court, for the reasons stated above, viz: because he does not bring his case within the statute of March 2, 1799, c. 23, nor establish a contract of legal obligations upon the United States.

Judges SCARBURGH and HUGHES.

We concur in so much of the foregoing opinion as denies the petitioner relief, for the reason that the money to secure which the cancelled bonds were given was not received; but on other points discussed therein we give no opinion.

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